IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-507

WILFRED KEYES, *et al.*,

Petitioners,

—v.—

SCHOOL DISTRICT No. 1, Denver, Colorado, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

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Opinions Below

The principal opinions of the courts below are as follows:

1. Opinion of District Court granting preliminary injunction, July 31, 1969, reported at 303 F. Supp. 279 (App. to Pet. for Cert. 1a-19a).

2. Opinion of District Court making supplemental findings and conclusions, August 14, 1969, reported at 303 F. Supp. 289 (App. to Pet. for Cert. 20a-43a).

3. Opinions of District Court on merits, March 21, 1970, reported at 313 F. Supp. 61 (App. to Pet. for Cert. 44a-98a).

4. Opinion of District Court on remedy, May 21, 1970, reported at 313 F. Supp. 90 (App. to Pet. for Cert. 99a-121a), and final decree June 11, 1970, unreported (A. 1970a).

5. Opinion of Court of Appeals, June 11, 1971, reported at 445 F.2d 990 (App. to Pet. for Cert. 122a-158a).

Other opinions filed in this case are as follows:

6. Opinion of Court of Appeals vacating preliminary injunction, August 5, 1969, unreported (A. 455a).

7. Opinion of Court of Appeals staying preliminary injunction, August 27, 1969, unreported (A. 459a).

8. Opinion of Mr. Justice Brennan as Acting Circuit Justice reinstating preliminary injunction, August 29, 1969, reported at 396 U.S. 1215 (A. 464a).

9. Opinion of Court of Appeals on motion to amend stay, September 15, 1969, unreported (A. 467a).

10. Opinion of District Court denying Motions to Dismiss, October 17, 1969, unreported (A. 475a).

11. Opinion of Court of Appeals granting stay, March 26, 1971, unreported (A. 1981a).

12. Per curiam Order of Supreme Court of the United States vacating stay, April 26, 1971, reported at 402 U.S. 182 (A. 1984a).

13. Opinion by Court of Appeals on Motion for Clarification, August 30, 1971, unreported (A. 1987a).

Jurisdiction

The judgment of the Court of Appeals was entered June 11, 1971 (App. to Pet. for Cert. 159a-160a). On September 8, 1971, Mr. Justice Marshall granted an extension of time for filing the petition for certiorari to and including October 9, 1971. The Petition for Writ of Certiorari was filed October 8, 1971, and granted January 17, 1972 (A. 1988a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provision Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

Whether petitioners are entitled to obtain system-wide relief to desegregate the Denver public schools because:

1. The district court's findings that "during the ten year period preceding . . . [1969] . . . the Denver School Board has carried out a segregation policy" (303 F. Supp. at 287), establish that the deprivation of constitutional rights of black pupils in Denver is so substantial and systemic as to require the use of remedial doctrines applied to dual systems created by segregation statutes.

2. The district court erred in ruling segregation to be "innocent" and lawful in certain schools serving Denver's older black neighborhood—including particularly Manual Training High School—because the court applied incorrect legal standards and perspectives in making its decision on intent to segregate and the causes of segregation.

3. The court below erred in holding that the sole criterion of constitutionally actionable racial segregation was segregationist intent judged by the narrow test whether decisions of the school board resulting in racial separation could conjecturally be explained by any conceivable non-racial explanation.

4. The Denver public schools have denied equal protection of the laws to students assigned to a number of predominantly Black and Hispano schools where there is manifestly an inequality in educational opportunity, both from the standpoint of the input resources placed in the schools by the school board and the educational achievement of the pupils.

Statement

I. *Introduction.*

This suit was commenced June 19, 1969, by petitioners, the parents of eleven children attending the Denver public schools, who seek injunctive and declaratory relief to remedy racial segregation of children and faculty and racial discrimination in the district's provision of public education. A. 3a. The complaint alleged that the district's practices violated the Equal Protection Clause of the Four-

teenth Amendment to the Constitution of the United States, and invoked the civil rights jurisdiction of the United States District Court for the District of Colorado. 28 U.S.C. §1343, 42 U.S.C. §1983. A. 4a. Plaintiffs asked for "a comprehensive plan for the school district as a whole" to remove segregation and afford equal opportunity. A. 32a.

After extensive litigation, the district court concluded that the school district had indeed violated petitioners' constitutional rights by various racially discriminatory practices, including deliberate segregation of black from white pupils in certain schools, and operation of a number of schools attended by Negro or Hispano[1] pupils where there was a serious and systematic denial of a chance for an equal education to pupils of these minority groups.

The district court first entered a preliminary injunction requiring the board to implement three resolutions it passed and rescinded prior to the lawsuit which were intended to begin desegregation of certain black schools in northeast Denver and to stabilize others in danger of be-

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[1] We adopt the term "Hispano" as it is customary in the school district and used throughout the record. A Colorado Department of Education publication explains the usage in this manner:

> "And as for a name for the people of this Latin heritage to go by, it has not yet been agreed upon. The term 'Hispano' is popular in their intellectual circles today. The late Jack Guinn, a staff writer for the *Denver Post*, quoted Dr. Daniel T. Valdes, historian and professor of sociology in Denver's Metropolitan State College, on the subject:
>
> > 'Hispano is a cultural term accurately applied to people of and from Spain, Mexico and Cuba, and any other country with a Spanish heritage. It avoids the confusion of hyphenated words, such as Spanish-American and Mexican-American, which are sometimes resented.'"
>
> COLORADO DEPARTMENT OF EDUCATION, HUMAN RELATIONS IN COLORADO, A HISTORICAL RECORD, 203 (1968).

Similarly, Caucasians or whites are often referred to in the record as "Anglos."

coming segregated. The preliminary injunction took effect in September 1969, after the order was twice vacated by the Tenth Circuit and ultimately reinstated by Mr. Justice Brennan as Acting Circuit Justice. *Keyes* v. *School District No. One*, 396 U.S. 1215 (1969).

In May 1970, the district court entered a final decree requiring a variety of remedies to redress the constitutional violations. The opinion on the merits reaffirmed the earlier findings of certain deliberate segregation practices and policies, but held that plaintiffs had failed to prove segregationist purpose and effect with respect to other schools not dealt with in the preliminary injunction hearing. The court also found that defendant board had failed to provide equal educational opportunity to students at a number of predominantly Negro and Hispano schools and that this denied equal protection. The trial court formulated a varied remedial plan, including (a) making permanent the temporary injunction, (b) desegregating 17 minority schools by such techniques as redistricting, transportation, specialty schools, and free transfer programs, and (c) ordering various "compensatory education" programs to improve the quality of education offered to minority students.

On appeal by the school board the Tenth Circuit affirmed in part and reversed in part. It affirmed the relief originally granted in the temporary injunction, and some additional measures relating to the northeast part of the City, upholding the trial court's findings that the school board engaged in an unconstitutional policy of deliberate racial segregation with respect to certain schools. However, the appeals court reversed the finding that there was a denial of equal protection by unequal treatment of minorities in predominantly Negro and Hispano schools, and set aside the relief requiring desegregation and educational

improvement programs for minority students not covered by the board's three 1969 desegregation resolutions enforced by the preliminary injunction. The court of appeals also rejected plaintiffs' appeal seeking the desegregation of nine other minority schools not covered by the district court's order.

II. *The Denver School District.*

During the 1968-69 school term, School District No. 1, which serves Denver, operated 119 schools with 96,580[3] pupils.[2] The principal minority groups are Negroes (14%) and Hispanos (20%); a more detailed breakdown of the attendance pattern appears below.[4] The system employed

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[1] There were 92 elementary schools, 15 junior high schools, 2 junior-senior high schools, and 7 senior high schools for a total of 116 regular schools. In addition, the board operated an Opportunity School, a Metropolitan Youth Education Center, and an Aircraft Training Facility. See DX-HK, p. 26, A. 2158a.

[2] References herein to those portions of the transcript of the various proceedings below, which are not reproduced in the Appendix will be made as follows:

—the hearing on the preliminary injunction, held July 16, 18, 21 and 22, 1969, will be cited as "P.H. Tr.";

—the hearing on the merits, held during February, 1970, will be cited as "Tr.";

—the hearing on relief held in May, 1970, will be cited as "R.H. Tr."

Exhibits introduced by petitioners, plaintiffs below, will be cited as "PX"; defendants' exhibits will be cited as "DX."

[4] Source: PX 242, 243, 273, 274, 302, 303; A. 2050a; A. 2053a; A. 2072a; A. 2074a; A. 2078a; A. 2080a.

	Anglo		*Negro*		*Hispano*		
Pupils	*No.*	%	*No.*	%	*No.*	%	*Total*
Elementary	33,719	61.8	8,297	15.2	12,570	23.0	54,586
Jr. High	14,848	68.7	2,893	13.4	3,858	17.9	21,599
Sr. High	14,852	72.8	2,442	12.0	3,101	15.2	20,395
Total	63,419	65.7	13,632	14.1	19,529	20.2	96,580

4,443 classroom teachers, including 7% Negroes and 1.9% Hispanos.[5] The city covers 98.4 square miles, including substantial areas annexed in the last thirty years.[6] The school budget for 1968-69 was more than $91.5 million dollars.[7] The district is governed by an elected board of seven members.

III. *The Pattern of Racial Segregation.*

A. Pupils.

At the outset of this case Denver schools were characterized by an intense pattern of isolation of black pupils from white pupils and an intense concentration of black teachers in schools with black pupils. Nearly three-fifths of the Negro pupils attend schools which are less than 10% Anglo, and nearly 4/5ths were in schools less than 30% Anglo:[8]

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[5] Source: PX 244, 245, 275, 276, 304, 305; A. 2055a; A. 2057a; A. 2075a; A. 2076a; A. 2081a; A. 2082a.

	Anglo		*Negro*		*Hispano*		*Other*		
Teachers	*No.*	*%*	*No.*	*%*	*No.*	*%*	*No.*	*%*	*Total*
Elementary	2,012	88.8	193	8.5	39	1.7	21	.9	2,265
Jr. High	881	88.5	87	8.7	22	2.2	6	.6	996
Sr. High	1,103	93.3	44	3.7	21	1.8	14	1.2	1,182
Total	3,996	89.9	324	7.3	82	1.9	41	.9	4,443

[6] The district grew from 58.8 sq. miles in 1940 to 98.4 sq. miles in 1969. DX HK, pp. 20-21; A. 2158a.

[7] DX HK, p. 19, A. 2158a.

[8] The district judge adopted a rule of thumb that schools with more than 70% of a single minority group were "segregated." 313 F. Supp. at 77; 313 F. Supp. at 92.

NUMBER AND PERCENTAGE OF PUPILS
1968-1969

ALL SCHOOLS

Percentage of Anglo Students	*No. of Schools*	*Anglo*		*Negro*		*Hispano*	
		No.	*%*	*No.*	*%*	*No.*	*%*
90–100%	31	28,096	44.3	379	2.8	845	9.3
80–89%	20	13,863	21.9	316	2.3	1,959	10.0
70–79%	15	7,609	12.0	595	4.4	1,921	9.8
60–69%	9	4,788	7.5	46	.3	2,413	12.4
50–59%	7	4,354	6.9	1,389	10.2	2,332	11.9
40–49%	4	1,163	1.8	140	1.0	1,340	6.9
30–39%	7	1,412	2.2	90	.7	2,232	11.4
20–29%	5	990	1.6	1,684	12.4	1,320	6.8
10–19%	8	870	1.4	1,346	9.9	3,372	17.3
1–9%	8	252	.4	4,785	35.1	1,441	7.4
less than 1%	4	22	0	2,862	21.0	354	1.8
Total	118	63,419	100	13,632	100	19,529	100

Source: PX 242, 243, 273, 274, 302, 303; A. 2050a; A. 2053a; A. 2053a; A. 2072a; A. 2074a; A. 2078a; A. 2080a.

The pattern of pupil segregation existed at all levels. At the elementary level where 92 schools serve comparatively smaller neighborhoods than at the secondary level, the pattern was particularly intense. Two-thirds of the black elementary pupils attended ten schools,[9] all of which had less than 10 percent Anglo pupils; indeed, one-third were in schools with less than 1% Anglo populations. More than four-fifths of the black elementary children at-

[9] The ten schools with less than 10% Anglo students in 1968-69 were: (less than 1%)—Barrett, Columbine, Mitchell and Whittier (less than 10%)—Crofton, Gilpin, Harrington, Smith, Stedman and Wyatt. Crofton, Gilpin and Wyatt had Hispano majorities and substantial numbers of black pupils.

tended schools less than 20 percent Anglo. The table in note 9 shows the breakdown.[10]

Black junior high pupils were concentrated at Cole, Morey and Smiley. More than four-fifths of the black junior high pupils (2423 out of 2893 or 83.7%) attended these three schools with 4 percent of the Anglo population.

The remaining 470 black students were scattered among 14 other junior high schools with 95.6% of the Anglos.

At the high school level blacks were concentrated in Manual Training High School and East High School which served 91% of all black high school pupils and 10% of Anglo pupils. Out of a total of 2,442 black high school pupils there were 1,200 (49.1%) at Manual, the only predominantly minority high school. Manual had 78 Anglo and 300 Hispano pupils. Another 1,039 black pupils attended East High School (53.7% Anglo). The remaining 203 black pupils were scattered in 7 predominantly Anglo high schools with 13,365 Anglos.

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[10] NUMBER AND PERCENTAGE OF PUPILS
1968-69

ELEMENTARY SCHOOLS

Percentage of Anglo Students	*No. of Schools*	*Anglo*		*Negro*		*Hispano*	
		No.	*%*	*No.*	*%*	*No.*	*%*
90–100%	22	18,614	40.4	242	2.9	401	3.2
80–89%	17	8,426	25.0	267	3.2	1,109	8.8
70–79%	11	4,164	12.3	404	4.9	894	7.1
60–69%	8	2,986	8.9	41	.5	1,490	11.9
50–59%	4	1,129	3.3	212	2.6	687	5.5
40–49%	3	711	2.1	76	.9	766	6.1
30–39%	7	1,412	4.2	90	1.1	2,232	17.8
20–29%	3	393	1.2	145	1.7	1,072	8.5
10–19%	7	734	2.2	1,257	15.2	2,718	21.6
1–9%	6	128	.4	2,701	32.6	852	6.8
less than 1%	4	22	.1	2,862	34.5	354	2.8
Total	92	33,719	100	8,297	100	12,570	100

Source: PX 242, 243; A. 2050a; A. 2053a.

B. Teachers.

Negro classroom teachers have been assigned in those schools where black pupils are concentrated. The District Court found that this concentration results from a deliberate school district policy of assigning black teachers to teach black children. 303 F. Supp at 284-285. In 1964, the Voorhees Committee, appointed by the Board to study the school system, reported this policy and urged its abandonment:

> While precise statistics are not available, the Committee believes that almost all of Denver Negro teachers were initially assigned to schools having a high proportion of Negro students. A few have been transferred to other schools. There is now at least one Negro teacher in each senior high school except for Manual which has eleven. Nine out of thirteen junior high schools have one or more Negro teachers, and Cole has thirty-three. One or two Negro teachers have been placed in each of seven elementary schools other than those which contain large numbers of Negro children.
>
> Spanish surname teachers are fewer in number than Negro teachers and the housing pattern of people of Spanish-American background is more dispersed. However, it does appear that relatively few Spanish surnamed teachers have been assigned to areas where there are few or no residents with Spanish-American background.
>
> As a result of its interviews the Committee is convinced that race has been relevant in the assignment of teachers. It appears that the administration has been extremely reluctant to place Negro and Spanish-American teachers in predominantly white schools because of concern with a possible lack of acceptance on

the part of a white neighborhood and a realistic assessment of the possible lack of support by some principals and faculties.

* * *

Recommendations as to Teacher Assignment and Transfer

1. The Board of Education should establish and enforce a policy that qualified teachers of minority background will be assigned throughout the system. A. 2015a-2016a.

Former Superintendent Oberholtzer confirmed that the racial policy was deliberate and he defended it on the ground that Negro teachers should be assigned to schools with concentrations of Negro pupils for whom they would have "immediate empathy" and for whom they would be "role-models". A. 1352a. In 1964 there were about 15 schools with Negro teachers, all located in the central part of the City. A. 1165a. By 1969-70, Negro teachers had been assigned to many more schools, but a disproportionate concentration remained in the schools with most of the black pupils.

In 1969-70 at the elementary level, with 193 Negro elementary teachers, 91 were concentrated in 9 schools, each of which had less than 10% Anglo pupils,[11] and 121 (62%) were in schools with less than 20% Anglo pupils.[12] At the junior high level, 60 of 87 black teachers, or 68%, were

[11] Thus, 91 or 47% of the black elementary teachers are assigned to Barrett, Columbine, Mitchell, Whittier, Gilpin, Harrington, Smith, Stedman and Wyatt. The only school with less than 10% Anglo pupils which has no Negro teacher is Crofton, a predominantly Hispano school. See PX 244, 245, 275, 276, 304, 305; A. 2055a; A. 2057a; A. 2075a; A. 2076a; A. 2081a; A. 2082a.

[12] *Ibid.* See Ebert, Elmwood, Fairmount, Fairview, Garden Place, Greenlee and Hallett schools (each with 10-19% Anglo pupils) with a total of 30 black teachers.

assigned to the three schools—Cole, Morey and Smiley—serving four-fifths of the black junior high pupils. Among senior high school pupils 25 of the 44 black teachers are assigned to Manual Training High School, the only predominantly minority high school in the district. Adding the six black teachers at East High School to those at Manual, we find 31 of the 44 black teachers (70%) at the two high schools attended by nine-tenths of the black high school students. The district judge concluded that the "tendency to concentrate minority teachers in minority schools has helped to seal off these schools as permanent segregated schools." 303 F. Supp. at 284-285.

IV. *Pupil Assignment Policies and Practices.*

The largest portion of the record relates to the pupil assignment practices of the Denver school authorities. The courts below made detailed findings on this subject. We undertake to summarize the major findings and evidence.

A. General policies and practices.

The district court found that the Denver school system had carried out a segregation policy for a ten year period prior to the filing of this lawsuit. Judge Doyle wrote:

> We have seen that during the ten year period preceding the passage of Resolutions 1520, 1524 and 1531, the Denver School Board has carried out a segregation policy. To maintain, encourage and continue segregation in the public schools in the face of the clear mandates of Brown v. Board of Education cannot be considered innocent. 303 F. Supp. 279.

Judge Doyle found that the "climactic and culminative act of the Board was the June 9 rescission of Resolutions 1520, 1524 and 1531" and "there can be no gainsaying the

purpose and effect of the action as one designed to segregate." 303 F. Supp. at 285.

The ten year period of undeviating and uniform conduct to concentrate the growing Negro population in separate schools in northeast Denver and to keep other schools white is detailed in the opinions below. See 303 F. Supp. at 284-286, 290-295; 313 F. Supp. at 64-69; 445 F.2d at 996-1002. Judge Doyle sums it up:

> Between 1960 and 1969 the Board's policies with respect to these Northeast Denver schools show an undeviating purpose to isolate Negro students first in Barrett, and later in Stedman and Hallett while preserving the Anglo character of schools such as Philips and Park Hill. The ultimate effect of the Board's actions and policies in the face of a steady influx of Negro families into the area was to create and maintain segregated situations at Barrett, Stedman, and Hallett which ultimately led to a substantially segregated situation at Smiley. 303 F. Supp. at 294-295.

During part of the period the board was carrying out its "undeviating purpose" to segregate Negro pupils, it claimed to operate under a color-blind neighborhood assignment policy. Indeed, the former Superintendent, Dr. Oberholtzer, thought that Colorado's constitutional prohibition against racial classifications of school children actually prevented him from adopting any policy designed to further integration or relieve the concentration of Negroes in certain schools. A. 1370a-1371a. At the same time that the school system was deliberately establishing segregated schools, the "view of the school administration [was] that it was precluded from taking action which would have an integrating effect". 313 F. Supp. 65.

Community protests in 1962 by black and civil rights groups over a plan to build an all-black junior high school

in northeast Denver on the same site with Barrett led the board to form the Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools (sometimes called the Voorhees Committee) which issued a report in 1964. PX 20; excerpts at A. 1997a-2020a. The 1964 report criticized the board's school boundary policies as perpetuating racial isolation, as well as the policy of concentrating minority faculties in minority schools. The committee concluded that segregated schools resulted in inequality in educational opportunity and recommended a policy of considering racial and ethnic factors in setting boundaries to minimize segregation and establish heterogeneous schools. The school board adopted such a position —Policy 5100 (PX 1; A. 1989a)—and then did nothing to implement the policy. 303 F. Supp. at 283. "Nothing of substance was accomplished". 445 F.2d at 996. The 1966 Berge Committee (PX 21) appointed by the board also suggested changes to lead to integration, but "Again, the recommendations were not effected". 445 F.2d at 996.

In May 1968 the board by a 5-2 vote adopted the Noel Resolution (Res. 1490, PX 2, A. 1991a), proposed by Mrs. Rachel Noel, its only black member, directing the superintendent to prepare a "comprehensive plan for the integration of the Denver Public Schools," for adoption no later than December 31, 1968. Superintendent Gilberts presented a plan in October 1968. DX-D; excerpts at A. 2128a. Eventually Dr. Gilberts proposed and the board adopted three resolutions relating to school segregation: Res. 1520 (Jan. 30, 1969), PX 3, A. 42a; Res. 1524 (Mar. 20, 1969), PX 4, A. 49a; and Res. 1531 (Apr. 24, 1969), PX 5, A. 60a. The three resolutions constituted a modest and tentative step to deal with segregation. Resolution 1531 was aimed at 2 black schools in northeast Denver (Barrett and Stedman) and two nearby Anglo schools (Park Hill and Philips). It desegregated Barrett by changing boundaries and transporting students to and from white schools. It left

Stedman with the same predominantly black percentage but reassigned about 120 blacks to white schools permitting the removal of 4 mobile classrooms from Stedman. The resolution also made boundary changes and used transportation to stabilize Philips and Park Hill as Anglo majority schools. The resolution also sought to integrate Hallett by promoting voluntary exchanges with white schools, a program started by a group of white parents in January 1969.

Resolutions 1520 and 1524 proposed to desegregate Smiley Junior High by boundary changes, and sought to prevent East High School from becoming segregated by other boundary changes. Finally, Resolution 1524 reassigned some 200 pupils from the majority black Cole Junior High to other schools, reducing the number attending this school, which would nevertheless remain only 1% Anglo. Despite the modest objectives of this pilot desegregation program, Judge Doyle found that the passage of these resolutions "constituted the first acts of departure from the Board's prior undeviating policy of refusing to take any positive action which would bring about integration of the Park Hill schools". 313 F. Supp. at 66.

However, on June 9, 1969, the board, its membership changed by an election in which integration was the principal campaign issue (A. 1087a), rescinded the three resolutions. The rescission by a 4-3 vote, over the opposition of the superintendent (A. 241a) occurred as soon as the new board members took office. Judge Doyle, after analyzing the effect of rescission on each of the affected schools, concluded that the only purpose of rescission was the perpetuation of segregation:

> This action was taken with little study and was not justified in terms of educational opportunity, educational quality or other legitimate factors. The only stated purpose for the rescission was that of keeping faith with the will of the majority of the electorate.

> The effect of the rescission was to restore and perpetuate the status quo as it existed in northeast Denver prior to the passage of Resolutions 1520, 1524 and 1531. This status quo was one of segregation at Barrett, Hallett, Stedman and Smiley. 303 F. Supp. at 295.

Although the main focus of the resolutions was aimed at only eight minority schools (Barrett, Stedman, Hallett, Park Hill, Philips, Smiley, Cole and East) they nevertheless involved 37.6% of all black students in the school system. Smiley and Cole enrolled 68.9% of black junior high students. East had 42% of black high school pupils. A chart showing the effect of the implementation of rescission of the resolutions on the attendance pattern of these schools, plus the 23 other schools involved in receiving transferred students under the three resolutions, is attached to the Tenth Circuit's opinion. See 445 F.2d at 1008. We point out in footnote 13 below the relation of the schools found to be deliberately segregated to the system as a whole.[13]

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[13] The board was found guilty of intentional segregationist acts of one kind or another with respect to the schools listed below. (As to Cole and East the conclusion rests on the rescission of Resolutions 1520 and 1524).

PUPILS—1968-1969

	Anglo	*Negro*	*Hispano*	*Total*
Barrett	1	410	12	423
Stedman	27	634	25	686
Hallett	76	634	41	751
Park Hill	684	223	56	963
Philips	307	203	45	555
Smiley Jr. High	360	1112	74	1546
Cole Jr. High	46	884	289	1219
East High	1409	1039	175	2623
Subtotal elementary	1095	2104	179	3378
Subtotal Jr. High	406	1996	363	2765
Subtotal Sr. High	1409	1039	175	2623
Total	2910	5139	717	8766

(continued)

B. The Manner in Which School Authorities' Decisions Have Determined the Racial Composition of Schools.

The record indicates the variety of decisions by which school authorities control the racial composition of schools in Denver. This control over racial composition has been purposefully exercised, according to the findings below, even during periods when the board asserted it was color-blind in such matters. The control appears in routine decision-making at the administration level, and in major and minor decisions by the elected school board.

It should be noted that there has been substantial continuity in administrative control of the Denver system for many years. Dr. Oberholtzer served as Superintendent from 1947-1967. A. 1300. The present Superintendent Howard Johnson (1970 to date) served as Deputy Supt. during Oberholtzer's tenure and remained in that position during Supt. Gilberts' tenure (1967-1970). Mr. Johnson was responsible for teacher placement and attendance boundaries during the years involved in the lawsuit. A. 256a-257a.

The findings below relate to decisions about such things as (1) the location of new schools and additions to schools, (2) the size of schools, (3) the utilization of schools, (4) the drawing of school attendance boundaries, (5) the use of optional zones, (6) the use of transfer plans, (7) the

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The total black school enrollment in 1968 was:

Elementary	8297
Jr. High	2893
Sr. High	2442

Thus the above-mentioned schools included:

Elementary	— 25.36% of all black elem. pupils
Jr. High	— 68.99% of all black Jr. High pupils
Sr. High	— 42.55% of all black Sr. High pupils
Total	— 37.69% of all black pupils

Source: PX 242, 243, 273, 274, 302, 303; A. 2050a; A. 2053a; A. 2072a; A. 2074a; A. 2078a; A. 2080a.

use of mobile classrooms, (8) the maintenance of transportation programs, (9) the composition of school faculties, (10) the differing educational programs offered at schools.

The record in this case shows that where race was an issue each type of decision was invariably made in Denver so that the *result* was racial segregation. For a decade before the suit was filed the court found they were made for the *purpose* of segregating. Yet the courts below found the system guilty of unlawful segregation practices only in those cases where the asserted justification for action was shown to be "a sham or subterfuge to foster segregation." 445 F.2d at 1000. Wherever the board could show *any* "rational neutral criteria segregative intent will not be inferred." *Id.* Indeed, the district court refused to find unlawful segregation in cases where it thought "the result is about the same as it would have been had the administration pursued discriminatory policies, since the Negroes, and to an extent the Hispanos as well, always seem to end up in isolation." 313 F. Supp. at 73. But, even with this strict burden of proof, which petitioners protest as too onerous, the Denver system was found to have engaged in a decade-long segregation policy affecting a substantial portion of the black community.

1. *Assigning Faculty by Race.*

As described at pp. 11-13 above, the school district admitted to a long time practice of assigning minority teachers to schools with minority children. The District Judge found that this practice "helped to seal off these schools as permanent segregated schools." 303 F. Supp. at 284-85. He also found that the reason for the practice was racial prejudice or more precisely that the reluctance to place minority teachers in white schools was because of

"concern over a possible lack of acceptance by the white community and because of a fear of lack of support by some faculties and principals." 303 F. Supp. 284.

The findings of unlawful segregation at Barrett (52.6% Negro teachers) and Smiley Jr. High (23% Negro teachers) were expressly related to the faculty assignments by race. 303 F. Supp. at 290, 294. Schools where black teachers were concentrated in heavily disproportionate numbers were invariably schools where black pupils were concentrated. See PX 318, A. 2083a; PX 258, A. 2059a; and DX-DG, A. 2146a, showing percentage of Negro teachers 1964-1968 in elementary schools with faculties 20% or more Negro. The percentage of black teachers at Barrett, Hallett, Smiley and Cole was actually greater in 1967 and 1968 than it was five years earlier when the board announced a policy of assigning minority teachers outside minority schools. A. 337a-38a.

The policy of assigning minority teachers to minority schools was in effect when Dr. Oberholtzer became superintendent in 1947 and continued in following years.[14] During the period when the board said it thought itself legally bound to be "color blind" in pupil assignments it nevertheless continued assigning black teachers to schools with black pupils. The board's policy was that a teacher's residence should have nothing to do with the teacher's school assignment, nor was it a reason for granting teacher transfers. A. 285a.

Negro principals were also assigned only to minority schools. The Voorhees Committee reported in 1964:

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[14] The first Negro teacher in Denver was hired at Whittier Elementary school in 1934. From 1934 to 1944 there were never more than five Negro teachers in the system and all were assigned to Whittier. By 1954 there were 43 Negro teachers in the system all assigned to minority schools. See PX 410, A. 2106a.

"At present, Denver's two Negro principals two Spanish-American assistant principals, one Negro assistant principal and one Negro teacher-assistant are assigned to schools in minority neighborhoods. (Two Negro coordinators and one Japanese-American assistant principal are not so assigned.) The Committee sees no acceptable reason why administrators with minority background should continue to be assigned to schools where minority students predominate." PX 20, pp. D-17-18.

2. *Size and Location of School Buildings; Additions to Buildings; Capacity Utilization; Mobile Classrooms.*

The racial composition of schools in the system was determined by interrelated decisions about such matters as the location of new schools, the construction of added space at existing schools by new permanent or mobile classrooms, and decisions to overcrowd[15] or under-utilize existing school capacities. For example, the district court found that Barrett elementary school was built in a particular location "with conscious knowledge that it would be a segregated school." 303 F. Supp. at 285. Barrett was built as a small school on a large site with its size designed to fit the number of black pupils in the area without providing any room for pupils from an overcrowded white school a few blocks away:

"At the time Barrett was built Stedman School, in a predominantly white area, and located a few blocks east of Barrett, was operating at approximately 20 percent over capacity. Yet Barrett was built as a

[15] Sometimes the decision would be made to use double sessions in a school to keep the children in their neighborhood. A. 1180a. Sometimes the school day was "extended" to increase capacity. A. 375a.

relatively small school and was not utilized to relieve the conditions at Stedman." 303 F. Supp. at 285.

Manual Training High School was built in 1953 as the smallest high school in the city (it still is) to accommodate the predominantly Black and Hispano population in the central city area. A. 1404a. It was admittedly designed to serve the minority community as Dr. Oberholtzer, then Superintendent, testified:

Q. Now, first of all, with respect to the building of new Manual, it's true, is it not, Doctor, that Manual High School today is the smallest high school in the district? A. It is the smallest senior high school, yes.

Q. And it was at the time it was built, also, was it not? A. I believe it was, yes.

Q. Why was Manual built so small, Doctor? A. Are you talking about new Manual or old?

Q. New Manual. A. The new Manual was built in the same general location as the old Manual and substantially the same attendance area. That was the reason.

Q. It was built to serve a particular community? A. The community in that area, yes.

Q. What was the composition of that community, Doctor? A. Negro and Anglo, largely; some Hispano.

Q. Well, you recall, do you not, Doctor, that as early as, I believe it's 1950-1951, that Manual was already a predominantly minority school, do you not, about 40 percent black, 35 percent Hispano, 25 percent Anglo? A. Somewhere in that neighborhood.

Q. And I assume that that neighborhood that new Manual was to serve wasn't getting any whiter between, say, 1951 and '53 when new Manual was opened? A. No.

Q. It was becoming blacker, was it not? A. There was some tendency, yes, to that.

Q. Well, it's true, isn't it, that when the new Manual opened, Doctor, it only had 77 Anglos in it?

Mr. Brega: Your Honor, I object to this line of testimony. In 1953—that was prior to Brown and at that time the law in the country was separate but equal. That was all right. If that were the case in Denver, that would not have been unconstitutional at that time. I think it's moot and not relevant to the the issues.

The Court: Well, I think that we have been permitting inquiry into the history of this for various purposes. So we will not draw the line at this point.

The Witness: Would you repeat the question, please?

Mr. Greiner: Would the reporter read it, please?

(Question read by the reporter.)

A. I do not recall that figure.

(A. 1404a-1405a.)

In 1949, 76% of Denver's Negro high school students (278 of 363) attended old Manual High School; by 1956, 84% of them (541 of 641) attended new Manual. A. 499a-500a; PX 401. A school board publication makes it clear that new Manual was designed to be a predominantly minority school to replace the old school of the same name PX 356, A. 2086a, "The New Manual":

"Some Basic Problems to Be Faced
In Planning a New Manual

There was little doubt when it became known that Manual would be on the "must" list of the new buildings that Manual could not be just a high school cut

from a general pattern. Manual is different. The college preparatory function of a high school is not the first consideration in Manual although it has not been neglected for those boys and girls who do go to college. For roughly three-fourths of the student body college is virtually an impossibility.

The usual problems faced by youth are sharpened for the many Manual boys and girls who are members of minority groups. Since 1926 the Anglo population at Manual has dropped from over eighty per cent to about forty-one per cent; the Negro population has gone from ten to twenty-seven per cent; the Spanish-American figure has risen from less than one per cent to twenty-three and one-half per cent; and the Oriental has gone from seven-tenths of one per cent to eight per cent. These boys and girls have needs which the school must meet in order to prepare them for effective participation in the community. The chart following shows the changing racial distribution in Manual."

The district court's decision about plaintiffs' complaint that Manual was "earmarked for minority occupants" was that "we have to be mindful of the evidence that it was opened in 1953 at a time prior to Brown v. Board of Education . . . , and we are told that this location had the consent of the people in the neighborhood." 313 F. Supp. at 69-70. The court said: "At that time there was much less concern about minority concentration." 313 F. Supp. at 70.

Control of racial composition by decisions as to capacity utilization is also illustrated by Manual which was operated under capacity from the time of its opening in 1953, although nearby East High School with only 2% Negro enrollment was "filled to capacity." 313 F. Supp. at 70.

School capacities were controlled by adding mobile classrooms to expand some crowded buildings. This became a

general practice in northeast Denver where there was a large migration of blacks in the 1960's and 28 mobile classrooms were erected to accommodate the black pupils.[16] Mobile classrooms were used almost exclusively at black schools in the northeast Denver area. A. 106a. Capacities at Stedman and Smith were systematically controlled by the periodic addition of mobile units to contain the blacks in the area.

Mobile units and new classrooms were added to Hallett beginning in 1965 to "solidify segregation."[17] Mobile units were added to Smith with similar results.[18]

3. *Transportation Policies.*

Denver has used its transportation system as an alternate means of dealing with the lack or shortage of facilities in particular neighborhoods, and this has necessarily had an impact on the racial composition of schools. The established policy was to make free transportation available to elementary pupils who lived more than a mile from their assigned schools. A. 1188a. In 1968 the school system sup-

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[16] "The building of 28 mobile units in the Park Hill area in 1964 (at the time there were only 29 such units in all of Denver) resulted in a further concentration of Negro enrollment in Park Hill schools. The retention of these units on a more or less permanent basis tended to continue this concentration and segregation." 303 F. Supp. at 285. See PX 101; PX 73, 74.

[17] "In 1965 four mobile units were constructed at Hallett. Shortly thereafter, the Board also approved the construction of additional classrooms. At this time Hallett was approximately 75 percent Negro. The effect of the mobile units and additional classrooms was to solidify segregation at Hallett increasing its capacity to absorb the additional influx of Negro population into the area." 303 F. Supp. 293.

[18] When the school became overcrowded Smith parents were offered a choice between adding mobile units at Smith or being bussed possibly back to black core city schools. A. 691a-694a, 696a-697a.

plied transportation to 1184 Negro and Hispano children (6% of minority elementary children) and 4,369 Anglo children (about 13% of Anglo elementary children). A. 775a. In 1969-70 the Superintendent said about 12,000 pupils were bussed and that the board's "pay-as-you-go" policy for financing new construction necessitated much of the busing in newly annexed areas. A. 1755a.

Basically in southeast and southwest Denver, Anglo pupils in newly annexed areas of the city were bussed to the nearest Anglo school which had available capacity.[19] A. 1183a-1184a. Before the lawsuit, no Anglo students were bussed to any predominantly minority schools. A. 1203a. The school administration policy was not to bus pupils into schools classified as the poverty area, target area or culturally deprived area under federal programs. A. 1205a-1206a.

Plaintiffs' Exhibits 390-A and 390-B are large maps (described in testimony at A. 767a-775a) which show that the school system bussed numbers of Anglo students past under-utilized minority schools.

Anglo pupils were bussed as far as ten miles before the lawsuit, some of the longest distances being from Southwest Denver to Asbury, University Park, Steele and Cory. A. 375a. Exhibit 390 shows that in many cases students who were being transported were not being taken to the nearest school which had capacity to absorb them. One of the more striking examples of this was the transportation in 1967 and 1968 of junior high school children from the Montbello area to Lake Junior High School. These children who live in the northeasternmost corner of the city were being transported past Cole Junior High School,

[19] The District did not employ mobile units to increase the capacity of schools which were even closer to the annexed areas. PX 101.

which was under-utilized, to the western edge of the city. PX 426. The Montbello children were predominantly Anglo, and Cole's membership was predominantly Negro. In this case a neighborhood or distance principle was not enforced.

Judge Doyle noted that the three 1969 resolutions contemplated the use of transportation facilities to promote desegregation. In ordering that the three resolutions be implemented he noted that "the board has had for many years and now has a policy of transporting students who live a certain distance from their schools," and thus transportation was "probably necessary in order to carry out this decree, but nothing in this order shall be construed to require the Board to use such transportation if it can be dispensed with." 303 F. Supp. at 296.

The court's final decree requiring integration of various schools contemplated that detailed plans about such matters as transportation requirements would be submitted to the court at a later date. In fact, the board did submit various transportation plans in considerable detail at a hearing which occurred in May 1971 while the case was pending on appeal.[20]

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[20] The transcript of this hearing commencing May 14, 1971 was not before the court of appeals because it took place while the appeal was under advisement. However the transcript has been lodged with the Clerk of this Court so that the Court may have access to all available materials about the case which may be relevant. Judge Doyle concluded that the board's Plan C as modified by the suggestions of plaintiffs' counsel should be adopted. May 1971 Tr. p. 445. The original Plan C would have required transportation for an estimated 3,919 pupils to desegregate the seven minority elementary schools in the first year of the plan. The estimated cost was $828.80 per day or about 21 cents per child per day. (See Report, Alternative Plans for Implementation of United States District Court Orders Stated in the Final Decree of June 8, 1970, Denver Public Schools, March 17, 1971, p. 51.)

4. *Establishing and Changing School Attendance Areas.*

The general practice in Denver was to hold public hearings and have formal board action only on secondary attendance boundaries and to permit the administrative staff to fix elementary school attendance areas or sub-districts without public hearings or detailed board attention. A. 117a; A. 901a. An important but unexplained exception to this general practice was the fact that various elementary boundaries in northeast Denver involved in the court's finding of deliberate segregation during the 1960's were set by the school board. A. 173a; 303 F. Supp. at 291. One consequence of the staff making elementary school zone changes is that many such changes did not appear in minutes of the school board, and for the years prior to 1960 only a few maps were still available at the time of the trial. A. 842a. Thus the parties engaged in attempting to reconstruct boundary maps for years prior to about 1960, except for the 1956-57 boundary changes. A. 842a-857a; 481a-484a.

The district court's findings of deliberate fixing of boundary lines for the purpose of segregating Negroes from whites related to (1) the original boundaries set when Barrett was opened in 1959 (303 F. Supp. at 290; PX 40, 41; A. 2021a; A. 2022a); (2) 1962 and 1964 boundary decisions affecting Stedman (303 F. Supp. at 291; PX 50, 53, 70, 71; A. 2024a; A. 2026a; A. 2028a; A. 2030a); (3) various actions during the 1960's maintaining Park Hill and Philips as Anglo schools (303 F. Supp. at 292); (4) 1962 boundary

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By the 1970-71 school year the system was transporting 12,500 pupils daily on 134 school buses, including busing of handicapped pupils, pupils in newly annexed areas, pupils more than one mile from elementary schools or more than two miles from junior high schools, pupils in crowded areas, pupils under the court orders of 1969 and 1970 and pupils on instructional excursions (*Id.* at 6-7).

decisions relating to Hallett-Philips and 1964 decisions relating to Stedman-Hallett and Hallett-Philips (303 F. Supp. 293); (5) rescission of the 1969 proposed boundary changes for Smiley and East (303 F. Supp. 294).

Plaintiffs offered evidence trying to prove discrimination in the fixing of various other boundaries which is summarized in the district court opinion at the pages indicated hereinafter: (1) original boundaries between New Manual and East High schools 1953, and changes in 1956 (313 F. Supp. at 69-70, 75); (2) Cole and Smiley Jr. High schools boundary change in 1956 (similar to Manual-East change at same time; 313 F. Supp. 70-71, 75); (3) Cole, Morey and Byers junior high school changes in 1962 (313 F. Supp. 71-72, 76); (4) Boulevard school boundary change 1961 (313 F. Supp. at 72, 76) and Columbine zone changes 1962 (313 F. Supp. at 72-73, 75-76). We summarize the evidence as to Manual, Cole and Columbine.

Manual. The eastern boundary of Manual in 1953 was set one-half block from the building. PX 203; Map of Manual Boundaries 1955; A. 2044a. It coincided with the easternmost Negro residence. As the Negroes moved eastward, the Manual boundaries were changed with them to embrace the Negroes as part of the mandatory Manual area where theretofore the area had been in an optional Manual-East zone. PX 204, Map of 1956 Manual Boundaries, A. 2046a. There was widespread concern in the Negro community about the segregationist effects of the proposed 1956 Manual changes, and Mr. Lorenzo Traylor, a black official of the Urban League, organized meetings with schools officials and community groups to protest the changes but had no success. His testimony about the Manual changes and the Cole boundary changes in 1956 shows very plainly that the boundary changes followed the black population migration eastward, that the school of-

ficials were made aware of this and that they declined to adopt alternative proposals that would have worked to integrate Manual and Cole. A. 580a-599a. In summary:

1. When the new Manual was built, its eastern boundary was only one-half block from the school, approximating the location of the Negro population.

2. The eastern boundary of Manual was moved eastward to York Street in 1956 commensurate with the Negro population movement.

3. This 1956 change occurred after widespread community concern that it would be a segregatory change.

4. During the relevant period Manual was always under-utilized and no rational justification for this boundary change on the basis of capacity utilization exists. PX 210, A. 2048a.

Cole. In 1952 Cole was under capacity and predominantly black and Hispano while Smiley to the east was overcrowded and still an Anglo school. PX 215, 215A. Rather than shift the boundaries to relieve overcrowding at Smiley by adding whites to Cole, the board built additional classrooms at Smiley. 313 F. Supp. at 71. In 1956 as the black community moved eastward the Cole boundary was shifted to follow them, the boundary change being the same as that described previously for Manual in 1956. *Id.;* PX 211, 211A, 211B. Again in 1958 another addition was built at Smiley notwithstanding that Cole still had empty spaces. *Id.;* PX 215, 215A. These changes were opposed by the black community, and Mr. Traylor of the Urban League offered the board boundary proposals which would have the effect of integrating the schools to no avail. A. 580a-599a. PX 333, A. 2118a. This was during the period when the board asserted that it was not lawful for it to consider

race for the purpose of integrating students. A. 1370a-1371a.

Columbine. The board established a series of optional zones around Columbine in 1951 which increased the Negro enrollment because it set up options which "were apparently employed by Anglo students as a means of escaping from Columbine to the almost totally Anglo Harrington and Stedman." 313 F. Supp. at 72-73; PX 406, 407. Although the asserted purpose was to relieve overcrowding at Columbine the court found that actually "the effect of the administration's action was to slightly decrease overcrowding at Columbine while creating an overcrowded situation at Harrington and Stedman." 313 F. Supp. at 72.

5. *Optional Zones and Transfer Devices.*

The board has employed a variety of devices which have enabled parents to choose schools so as to achieve racial separation. Optional zones located in the border areas of mixed racial population between white and black schools functioned as an effective device to accommodate segregationist sentiment among the public. The two optional zones between East and Manual defined the racially mixed neighborhoods, and as soon as a neighborhood became all black it was shifted from an optional zone to a mandatory part of the Manual zone—Traylor testimony at A. 580a-592a; PX 203, 204; A 2044a; A. 2046a.

The use of optional areas for whites to escape black students at Columbine is discussed in the preceding section. The Cole-Smiley optional zone was identical to the Manual-East optional area. A. 502a-503a; PX 211, 211A, 212, 212A.

The Voorhees Committee Report denounced the board's use of optional areas and recommended that the board im-

mediately stop the practice "at the earliest possible date." PX 20, pages A-12 to A-13; A. 2013a. The report stated that the "use of optional areas forms no part in rational administration of the system for fixing boundaries which the Committee has recommended" *Id.* After this report the board eliminated the last optional zones in 1964 (A. 1347a), but in September 1964 instituted a Limited Open Enrollment (LOE) program which gave pupils freedom of choice to transfer out of the schools in their attendance zone to certain schools which were designated as open to LOE transfers. A. 299a; 304a.

Under LOE a student could transfer to any school where openings were listed as available but the student had to furnish his own transportation. There were in 1968 only 365 LOE spaces open at the elementary level. A. 541a; PX 87, 89, 90; A. 2032a; A. 2034a; A. 2036a. No priority was given to transfers that would promote integration nor was there any prohibition against transfers that would tend to promote segregation. Plaintiffs' evidence showed that the LOE program involved only about 267 elementary students out of 50,000 (A. 538a). It had negligible effect toward integration—a maximum of 29 pupils—while an estimated 58 to 77 white pupils left black schools to attend white schools. A. 538a; PX 99, 100. Plaintiffs showed that 10 Anglo schools which were under-capacity and receiving Anglo pupils by bus were not on the list reporting LOE openings. A. 539a-540a; PX 89, A. 2034a. Seven predominantly minority schools with an overall Anglo percentage of only 12 percent contained over 55 percent of the available LOE spaces (203 of the 365 elementary openings in the district). A. 541a; PX 90, A. 2036a. Although objective data shows that the white schools had space available, the principals were not reporting space as open for LOE purposes. PX 89, A. 2034a; PX 87, A. 2032a.

The Voluntary Open Enrollment (VOE) program adopted in the fall of 1968 and implemented in January 1969 was offered as an integration program. Shortly after the Board announced the program a group of white parents formed the idea of targeting Hallett school as a black school which might be integrated if a sufficient number of whites could be organized to volunteer to transfer in and an equivalent number of blacks could be organized to transfer out. A. 665a-683a. Their initial efforts were rebuffed by Deputy Supt. (now Supt.) Howard Johnson, who stated they had no duty to *promote* the VOE program but merely to make it available. A. 675a. Later in Resolution 1531 (April 1969) the board endorsed the idea of making Hallett a "demonstration integrated school as of September 1969, by use of voluntary transfer". A. 68a. After an intensive summer recruitment program (A. 687a-691a), VOE helped to change Hallett from 84% black in 1968 (Anglo pupils—76, black 634, Hispano 41) to 58.4% black in 1969-70 (Anglo pupils 290, black—444, Hispano—22). About 1500 pupils were involved in the VOE program in the entire city. A. 1769a. At the relief hearing in May 1970 the board offered its VOE program as the sole remedy to achieve integration. Judge Doyle, while permitting the VOE program to continue, refused to permit the Board to limit its integration program to this one technique.

6. *Curriculum, Level of Instruction and the Atmosphere of Segregated Schools.*

Manual Training High School was planned prior to 1953 to offer a curriculum designed for minority and other low income students. See *supra* pp. 23-24. Manual was planned as a lower caste school to meet the "special needs" of lower income and minority pupils about whom it was noted that "Fewer pupils got to college," "Fewer take college preparatory subjects," "More go to work immediately" and

"More go into unskilled and semiskilled labor." PX 356; A. 2086a. Such prophecies of course have a way of becoming self-fulfilling, and people who want to avoid the mold will try to avoid the school. Robert O'Reilly, one of plaintiffs' expert witnesses called this sort of thing "programming students into basically lower occupations than the whites are programmed into." A. 1964a.[21]

The community perception of Manual and its feeder school Cole Junior High was negative. The feeling in the black community was that Manual was a substandard school and that the quality schools were in other parts of the City according to George Brown, a black State legislator and former local newsman covering education subjects. A. 865a. The dropout rate was high and "even the name had its negative connotation" he said. A. 865a. Manual's black principal was aware of the community resentment toward the school and of the reluctance of employers to hire Manual graduates. A. 1847a. He attempted many program innovations, but acknowledged that Manual students scored in the 34th percentile in 1965 and had slipped to the 28th percentile by 1968 on standard achievement tests. A. 1874a.

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[21] The Court: Well, they're doing this at both Manual and Cole. They're making more or less specialized schools out of them and programs they have never done before. This is in self-defense.

The Witness: Well, this kind of thing really goes back over a hundred years. In a situation like this, why, where mostly black and Hispano students are getting that kind of program and whites are getting another kind of program—and you have a system where grouping occurs into special programs from the elementary on up through the secondary level, it finally ends up in vocational training. And amounts to, in my opinion, programming students into basically lower occupations than the whites are programmed into. The whites are programmed into another environment. And, you know, I don't know whether this is planned this way, that is my feeling.

The Court: This is a danger, you say?

The Witness: I think it's a very clear danger.

The principal of Cole Junior High School took office in January 1969 and found what he described as "turmoil, confusion and conflict". A. 1875a. The school had severe discipline problems and had three principals in three years. A. 1891a.

Judge Doyle, after hearing days of testimony, said of Manual and Cole:

> "Those two schools are sort of symbols, it seems to me, of segregation. I mean, they seem to, for some reason to—to have that character." A. 1687a.

Professor Dan Dodson described the problem of such schools in these terms:

> " . . . But I think that the point of takeoff would be that the school itself is reflective of the broader society or the dominant power arrangement of the community, and that when it comes to dealing with the children of minority, it has a problem of adjusting its programs that are designed for a majority to serve minority children for very definite reasons. Usually it is a teacher who is less experienced; usually it is a school that is older and so on. Usually it is a school by the time it becomes segregated that is looked upon by the whole community as being inferior. And when it is looked upon as being inferior this does make it indeed so, because you can't keep up the morale of the teachers nor the children, nor you can't keep up the expectations for performance and achievement in the schools. Teachers feel less privileged when they are sent there to teach and escape as quickly as they can. More than this, they come to look at these children as being less worthy and of whom less is expected. Consequently there has developed what's called the self-fulfilling prophesies; that because nothing is expected, no standards are held. And consequently the person comes

to fulfill the prophesy that you had of him in the beginning. Some evidence of this is that the differences are not this great between children when they first come to school between the majority and the minority, and that with each succeeding year these children of the minority tend to fall further behind. The alternative that I would pose to the position that the trauma resides—or the limitation reside in the pre-school experience, is that all this combines to teach these children of the minority that they are powerless people and consequently as all people tend to do when they feel powerless, they resign in apathy and that the limitations to learning is not in their cognitive apparatus nor abilities nor in the lack of pre-school stimulation, but resides instead in the apathy that stems from a pervasive powerlessness and impotence in the community.

A. 1473a-1474a.

Judge Doyle made findings about the interrelationship of these intangible factors which tend to label a school and reinforce the image of a school as a segregated institution:

At this point, the Negro community does not consider the segregated school as a legitimate institution for social and economic advancement. Since the students do not feel that the school is an effective aid in achieving their goal—acceptance and integration into the mainstream of American life—they are not motivated to learn. Furthermore, since the parents of these Negro students have similar feelings with respect to the segregated school, they do not attempt to motivate their children to learn. Teachers assigned to these schools are generally dissatisfied and try to escape as soon as possible. Furthermore, teachers expect low achievement from students at segregated schools,

and thus do little to stimulate higher performance. 313 F. Supp. at 81.

V. *Denver's Segregated Minority Schools Afford Their Minority Students an Educational Opportunity Inferior to That Afforded by Predominately Anglo Schools in the District.*

The evidence below demonstrated convincingly and the trial court found, as a matter of fact, that certain of Denver's segregated schools afforded an unequal and inferior educational opportunity to their minority students.

Much of the evidence covered September, 1963 through May, 1969, just prior to the lawsuit. However, there is ample basis for concluding that this inequality of opportunity has existed for so long as there have been segregated schools in Denver.

All of Denver's segregated[11] minority schools shared cer-

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[11] Plaintiffs' evidence and exhibits concentrated on comparing groups of Minority and Anglo schools selected on the basis of probability anlaysis (A. 701a-707a). Essentially the schools which had the greatest deviation from the district's overall ethnic compositions were selected. The schools compared were 21 Anglo elementary schools with 20 minority elementary schools, 4 Anglo Junior Highs with 4 Minority Junior Highs, and 3 Anglo Senior Highs with 3 Minority Senior Highs. (Two of the "minority" senior highs actually had slight Anglo majorities of 53-54 percent.)

All of these minority schools reflected the same deficiencies in teacher experience, teacher turnover, age of buildings, drop-out rates and low achievement.

In its opinion of March 21, 1970, in determining whether a school was "segregated" the trial court adopted a standard whereby a school had to have a Negro or Hispano enrollment of approximately 70% before it would be considered "segregated." Out of the 20 elementary schools identified by plainitffs, twelve met the court's standard. In addition, two additional elementary schools, Smedley and Elyria, based upon 1969 data, met the court's standard and were added to the court's list of "segregated" schools in its May 21, 1970, opinion. These 14 schools will be referred to herein as the "court-designated" elementary schools.

In discussing the statistics regarding the inferior schools, for the sake of consistence as to the referenced schools, we will generally

tain common characteristics reflecting their inferiority. These schools, when compared to predominately Anglo schools possessed none of the attributes necessary to learning or to the development of self respect and confidence in the minority children.

These deficiencies and disparities were tangible and intangible, objective and subjective, and included educational inputs as well as educational results. Much of the objective, tangible evidence of this inferiority came from the school district's own records and reports. In addition, several of this country's leading experts[22] testified as to the intangible, subjective characteristics of the environment of these segregated schools which tend to impede and destroy the academic progress as well as the self development of the minority children.

The record demonstrates that all of these characteristics inhere in the segregated school, regardless of how it became segregated. In combination they create a school and

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be referring to a group of 22 elementary schools: Boulevard, Bryant-Webster, Columbine, Crofton, Ebert, Elmwood, Elyria, Fairmont, Fairview, Garden Place, Gilpin, Greenlee, Hallett, Harrington, Mitchell, Smedley, Smith, Stedman, Swansea, Whittier, Wyatt and Wyman. At the junior high school level: Morey, Baker, Cole and Smiley; at the senior high school level: East, West and Manual.

Of the four junior high schools identified by plaintiffs, Morey did not meet the standard; of the three senior high schools, only Manual was found by the trial court to be segregated.

[22] Dr. Dan W. Dodson, Professor of Education, New York University; Dr. James Coleman, Professor of Social Relations, Johns Hopkins University, Director of the survey for the United States Commissioner of Education on equality of educational opportunity, which was published as "Equality of Educational Opportunity," PX 500; Dr. Neil Sullivan, Secretary, Massachusetts State Board of Education, former Superintendent of Schools, Berkeley, California; Dr. Robert O'Reilly, Chief, Bureau of School and Cultural Research, New York State Department of Education, author of "Racial and Social Class Isolation in the Public School," PX 506.

an educational environment which is inherently unequal and which seems programmed to produce the failure which results.

A. The Segregated Schools Have Homogeneous, Low Social Class Composition Which Deprive the Minority Children of an Important Element of Learning, a Heterogeneous Peer Group.

One of the most important educational attributes of a school is the peer group with whom the student attends school. The segregated school brings together children, most of whom are poor, who come from so-called deprived home environments, and whose parents have a relatively low level of education and employment.[24]

National studies[25] have demonstrated that this social class composition of the school is a more important source of learning than the teachers themselves.[26] Children learn as much or more from their peers than from the academic curriculum of the schools. The school with a heterogeneous social class composition, particularly one which is predominately middle class, offers the most advantageous learning environment to *all* of its pupils, both minority and majority.[27] Dr. Coleman made it clear that his research was concerned with the impact of other children upon a child's performance rather than the influence of that child's own background upon his performance. A. 1536a.

When this homogeneous low social class is combined with racially identifiable, isolated schools, the education oppor-

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[24] PX 20, pp. 2-8, A. 2000a-2004a; PX 20, Map No. 5; PX 20, pp. D1-D5, A. 2008a-2011a; PX 83.

[25] PX 500; PX 27.

[26] Coleman, A. 1531a-1535a.

[27] Coleman, A. 1535a; RH Tr. 74-75.

tunity afforded by the school is destined to be inferior. The district court, in discussing this evidence, stated as follows:

> Since Negro and Hispano children from low socio-economic families are typically not provided with this stimulation, a compensating stimulation must be provided by the peer group in the school. Where all children in the school come from families with similar low socioeconomic status, the negative effect produced by family background is reinforced rather than alleviated. 313 F. Supp. at 94.

B. The Quality, Experience and Stability of the Teaching Staffs at the Segregated Schools Are Significantly Inferior to That of Denver's Predominantly Anglo Schools.

The quality of education at a school is next most affected by the quality, experience and stability of its teaching staffs.[32]

1. *Teacher Experience.*

When compared to city-wide averages, the segregated minority elementary, junior and senior high schools over the years have had significantly higher percentages of teachers with no prior teaching experience in the Denver public schools.[33] These schools also had significantly higher percentages of probationary teachers,[34] while teachers with

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[32] PX 500; Coleman, A. 1531a-32a.

[33] PX 247, 260, 262, 263 (A. 2060a) as to elementary schools; PX 278, 291, 293, 294 as to junior high schools; PX 307, 320, 322, 323 as to senior high schools. Bardwell, A. 732a, 737a-738a, 742a-744a.

[34] Teachers with less than 3 years' experience in the Denver Public Schools. Compare PX 247 with PX 260, PX 278 with PX 291, PX 307 with PX 320.

ten or more years experience shunned these schools, preferring the predominantly Anglo schools.[21]

When the comparison of teacher experience was with the averages for the predominantly Anglo schools rather than the district average, the disparities were even greater:[22]

Percentages of Teachers with No Prior Denver Public Schools Experience, 1968[23]

	Average
22 Minority Elementary Schools	22.4%
20 Anglo Elementary Schools	9.8%
Total District	15.9%

The pattern was repeated at both the junior and senior high school level:

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[21] *Ibid.*

[22] Bardwell, A. 725a-745a.

[23] PX 260, PX 262. The disparity was as great in prior years:

Percentages of Teachers With No Prior Denver Public Schools Experience

	1964	*1965*	*1966*	*1967*
22 Minority	13.7	10.7	15.8	20.9
20 Anglo	6.2	4.8	9.5	6.9
District	11.3	8.6	13.9	16.2

Source: PX 263, 264 (A. 2062a), 265 (A. 2064a), 266 (A. 2066a).

Percentages of Teachers With No Prior Denver Public Schools Experience, 1968[34]

Junior High Schools	*Average*
4 Minority	34.8%
2 Anglo	15.3%
District	21.1%
Senior High Schools	
3 Minority	16.3%
3 Anglo	7.4%
District	10.3%

The trial court found that: "Faculty experience is an important factor in determining the educational opportunity offered at a particular school . . ." 313 F. Supp. at 79. Teacher salaries in Denver were based on the teacher's level of experience; the greater the experience the higher the salary. A. 1249. For example, salaries ranged from $6,300 to $9,900 for teachers with an A.B. degree. DX-HK, pp. 36-37. Salaries were an important allocation of the District's resources, accounting for some 69% of the total District budget. DX-HK, p. 17. Because of their higher concentration of experienced teachers, the predominately Anglo schools received a disproportionate share of these resources.

2. *Teacher Turnover.*

Because the District's policies on teacher transfers between schools were premised on seniority, the high turnover of teachers in the minority schools created more vacancies typically filled by new teachers. 313 F. Supp. at 80.

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[34] PX 291, 293, 294, 295, 296, 297 as to junior high schools. PX 320, 322, 323, 324, 325, 326 as to senior high schools.

The trial court held:

> The effect of teacher turnover on the quality of educational opportunity is twofold. First, a high teacher turnover rate tends to have a disorganizing effect on the school in question. Furthermore, and most important, the teacher turnover rate in a particular school significantly affects the experience of the faculty at that school. 313 F. Supp. at 80.

The trial court also recognized the destructive psychological impact of this high turnover on students, and its contribution to the aura of inferiority which prevails in the segregated school. 313 F. Supp. 81.

3. *Teacher Attitudes.*

The teachers in the minority schools are often afflicted with attitudes and expectancies which contribute to the inferiority of the educational opportunity.[35] The trial court recognized this factor:

> Teachers assigned to these schools are generally dissatisfied and try to escape as soon as possible. Furthermore teachers expect low achievement from students at segregated schools, and thus do little to stimulate higher performance. 313 F. Supp. at 81.

The matter of expectancy then becomes a self-fulfilling prophecy of failure.[36]

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[35] Dodson, A. 1473a.

[36] PX 27, pp. 93-100, 104-106; Dodson, A. 1473a.

C. Inequality of Facilities.

The trial court found that in general the segregated schools occupied older buildings and smaller sites.[37] 313 F. Supp. at 80-81. Dr. Dan Dodson testified that where minorities were relegated to these outdated, older facilities, "it stands as a symbol of their impotence in the community," it was a "place of less choice, and you go there only because you're not able to require that you be allowed to go someplace else." A. 1494a. The court concluded that, standing alone, such disparities were not substantial factors with respect to the educational quality of the school, but found that it did have a cumulative adverse impact:

> However, we do recognize that in schools which are segregated, have less experienced teachers and produce generally low achieving students, the fact that the physical plant is old may aggravate the aura of the inferiority which surrounds the school. 313 F. Supp. 81.

D. The Inferiority of the Segregated Schools Is Also Demonstrated by the Drastically Low Level of Academic Achievement Which They Produce.

The trial court's findings of the poor scholastic performance in the segregated schools concentrated on results of tests administered during the 1967-68 school year. 313 F. Supp. at 78-79, 86. The school district's own witnesses acknowledged that the results were typical, and that achievement data from earlier tests would disclose the same disparities.[38]

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[37] PX 268, 269, 270 (A. 2068a), 271 (A. 2070a) as to elementary schools; PX 298, 299, 300, 300-A for junior high schools; PX 327, 328, 329, 330, senior high schools; Dodson, A. 1494a.

[38] Oberholtzer, A. 1437a-1439a; Cavanaugh, A. 643a, 654a; PX 377, 378; A. 2098a; A. 2100a.

The trial court considered only schools which were approximately in excess of either 70% Negro or 70% Hispano, resulting in findings relating to 14 elementary, 2 junior and 1 senior high school. The evidence disclosed the same low level of achievement, teacher experience, etc. at Morey Junior High School and at 8 other elementary schools[39] whose combined Negro *and* Hispano enrollments ranged from 70% to as high as 98% in 1968.[40] However, the trial court refused to find such schools to be "segregated," and ordered no relief for them. 313 F. Supp. 77; 313 F. Supp. at 92.

With regard to the 14 elementary schools which the trial court did find to be both segregated and inferior, in 1968, at the third grade their mean achievement level was a half year behind the district average.[41] The disparity was of course greater when the minority schools were compared to a group of 20 predominately Anglo schools, whose mean achievement level was more than one and one-third years ahead of the minority students.[42]

By the fifth grade the minority students were nearly 2.2 grade levels behind students in the selected predominately Anglo schools:[43]

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[39] Boulevard, Crofton, Ebert, Garden Place, Gilpin, Swansea, Wyatt and Wyman; see PX 509 (A. 2122a), 510 (A. 2124a); Bardwell, A. 1603a-1614a.

[40] PX 510, A. 2124a.

[41] Grade level 2.97 compared with the 3.57 district average.

[42] PX 377 (A. 2098a), 380 (A. 2102a), 381 (A. 2104a), 382. The Anglo schools were at the 4.34 grade level.

[43] PX 376-R, 380, 381; A. 2096a; A. 2102a; A. 2104a.

	Grade Level Score 5th Grade
Minority Schools	4.30
District Average	5.22
Predominately Anglo Schools	6.45

Achievement at the ninth grade level is expressed as a percentile score based on national averages.[44] The trial court found that the district-wide average at the ninth grade was percentile 53.8; the two minority schools, Baker and Cole, were 25.6 percentiles behind at 28.2.[45] 313 F. Supp. at 79. Principal Morrison testified that out of approximately 325 seventh graders at Cole, 160 of them were reading three to four grade levels below normal. A. 1894a.

Similarly, the segregated senior high school, Manual, was achieving at the 30th percentile while the district-wide eleventh grade level was the 52nd percentile. 313 F. Supp. at 79.

Another characteristic of the impact of the segregated schools is the progressive regression in achievement as the minority child proceeds through the grades. This regression is illustrated in Exhibit 382, based upon test results in 1969. At the second grade the gap in achievement between selected Anglo and minority schools is not quite one full grade; by the third grade this gap has increased to 1.41; in fourth grade, to 1.86; by the fifth to 2.10. The average minority achievement in the fifth grade, which should

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[44] Thus at the 50th percentile one-half of those tested nationally scored above and one-half below that level; at the 75th percentile 75% of those tested scored below that level.

[45] Morey was at the 29th percentile. PX 83.

be at grade level of 5.6 is only at 4.42, while the children in the predominantly Anglo schools are achieving at a level of 6.53. The longer the minority child stays in the segregated school the further behind he gets, even though he "passes" progressively from grade to grade.[46]

E. Most of Denver's Minority Children Attend the Inferior Schools.

Exhibit 374 identifies 45 elementary schools achieving at or below the 40th percentile in the fifth grade, 1968. Over 86% of the District's Negro elementary school children and over 78% of the Hispano children attend these schools,[47] a total of 17,024 minority children. In contrast, Exhibit 375 identifies 22 schools achieving at or above the 60th percentile. While over 40% of the Anglo children in the District attend these schools, only 4% of the Negro and Hispano children attend them.

F. The Fact of the Inequality Has Been Known for Years by the School Administration.

Two committees appointed by the Board, one reporting to 1964 and the other in 1967, each recognized the inequality and concluded that there was a close relationship between the concentration of minority students and inequality of educational opportunity.[48] The 1964 Report noted:

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[46] PX 380 (A. 2102a), 381 (A.2104a), 382; Klite, A. 555a-556a; Dodson, A. 1473a-74a; Dodson, PH Tr. 311-313.

[47] PX 376-R, A. 2096a; Klite, A. 553a-554a. In the 1968-69 school year the 22 minority elementary schools contained 79.5% of the District's black elementary children (6,597) and 46.6% of Hispano children (5,858), but only 5.4% of the Anglo children (1,815). The 30 elementary school achieving at or below the 30th percentile contain 60.5% of the black children (5,022), 63.6% of the Hispano (7,989) and 12.5% of the Anglo children (4,205). See also, PX 241; Bardwell, A. 704a-706a.

[48] PX 20, A. 2003a; PX 21.

> There is abundant authority to the effect that "de facto" separation in schools may result in educational inequalities, and there is in Denver wide belief among the racial and ethnic minorities that the schools to which their children go are in some way unequal. 313 F. Supp. at 81.[49]

That the committee was able to discern this inequality is noteworthy, for the members were given none of the data on teacher experience, teacher turnover, drop-out rates or achievement on an individual school basis which led the trial court to its factual findings of inequality. Of course, the school administration reviewed the test results annually, and knew of the disparities.[50]

However, it was not until October of 1968, shortly after a new superintendent replaced a 20-year incumbent, that the school administration first made public comparative school achievement scores on a school-by-school basis.[51] Prior to that time not even board members had been furnished with this data. The revealed disparities had a strong impact on the attitudes of some members of the Board of Education with regard to the availability of equal educational opportunity in the minority schools. Board member Voorhees concluded "something was wrong" in the way minority children were treated in the system:

> I suppose what crystallized this change more than anything was the release by the Superintendent sometime last fall, I believe, of some test scores—comparative

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[49] See also, 313 F. Supp. at 81-82.

[50] Cavanaugh, A. 631a; Oberholtzer, A. 1330a-31a, A. 1437a-38a.

[51] Cavanaugh, A. 637a-638a. According to Mr. Cavanaugh the underlying reason for the prior policy against publishing comparative data was that such comparisons "would be detrimental to the esprit de corps." A. 638a.

test scores which indicated to me a direct correlation between concentration of poor children, minority children, and low achievement as compared to other schools where these conditions were not present. A. 145a.

For the first time the minority community could see what they had suspected all along—the clear inferiority of their schools.

C. The School Administration Obfuscated the Poor Achievement Results at Minority Schools.

Prior to 1968 the school administration had been less than candid about achievement levels in the minority schools. Their written reports, distributed to teachers and parents often described dismal results in glowing terms.[52]

The 1956 test results for 6th grade pupils at predominantly-Hispano Fairview Elementary School showed most students performing poorly and nearly 2 or more years below grade level. But in their 1956 report on these test results sent to Fairview parents and faculty the school administration stated: "The 1956 test results indicate a good consistent program of instruction at Fairview school. . . . The faculty should be pleased with these achievements."

Similarly dismal achievement results were experienced that year at predominately-Negro Wyatt Elementary School, but the report concluded that: "The faculty should be well pleased with these achievements." The record reflects numerous other examples of this pattern of reporting about minority schools.

The school administration's gloss also covered poor achievement at the junior high school level. In 1956, Cole Junior High School, predominately Negro, was achieving at the 21st composite percentile at 9th grade and below

[52] PX 379; Klite, A. 559a-562a.

expectation.[45] In spite of this poor performance, the school administration at Cole summed up the situation as follows: ". . . the general picture of this group is very similar to that of the group tested in 1953. In both years, pupils at all levels evidenced satisfactory achievements in the subject-matter area. The faculty should be pleased with these accomplishments." [46]

In 1958, 9th grade students at Cole on similar tests achieved at the 20th composite percentile, 5 points below expectation and 30 points below the national norm. Yet, the district's report to parents and faculty declared: "Two-thirds of the scores indicated on the accompanying chart fall at or about expectancy, a fact that indicates that the majority of 9th grade pupils at Cole Junior High School are making very satisfactory academic progress in the various areas measured by these tests." [47]

H. The District Established Low Achievement Standards for the Segregated Schools.

The reason for these accolades lies in another pernicious practice of the school administration, the establishment of levels of expected performance. Based upon the inter-quartile distribution of I.Q. scores for the class in the school,[48] the District set up low achievement expectancies for each of the minority schools.[49] This expectancy was

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[45] At predominately-Anglo Merrill, 9th graders were achieving at the 82nd composite percentile, 10 points above expectancy. The administration's summary for Merrill paralleled that of Cole: ". . . the faculty should be pleased with these attainments."

[46] Klite, A. 556a-559a; PX 379.

[47] PX 379.

[48] Cavanaugh, A. 635a-636a; Klite, A. 545a; 559a-562a.

[49] In the fourteen court-designated elementary schools, at the 5th grade level the school administration uniformly established the expectancy at the 23rd percentile. Thus 77% of the children tested

for failure. Officially excused for substandard academic performance the teachers in the minority schools could rest assured that the failure was not their fault; according to the District's standards it was not a failure at all.[44] The

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nationally achieved above this level. Only one of these schools actually achieved above the 30th percentile. In 1968 the median results were as follows:

	Fifth Grade 1968	
School	*Expectancy Percentile*	*Score Percentile*
Bryant-Webster	23rd	22nd
Columbine	23rd	19th
Elmwood	23rd	28th
Elyria	23rd	23rd
Fairmont	23rd	14th
Fairview	23rd	18th
Greenlee	23rd	17th
Hallett	23rd	32nd
Harrington	23rd	15th
Mitchell	23rd	12th
Smedley	23rd	19th
Smith	23rd	30th
Stedman	23rd	28th
Whittier	23rd	19th

For 9th graders at Baker and Cole in 1968 the overall median expectancy was the 25th percentile; at Morey, the 27th percentile; at Smiley, the 36th percentile.

For 11th graders at East High School the overall median expectancy was the 40th percentile; at West High School, the 33rd percentile; at Manual, the 21st percentile. As to Manual the school administration commented:

> "Eleventh grade pupils at Manual High School have achieved very commendable levels of academic accomplishment compared with expectancy. Even though the level of expectancy for these pupils is below national norms, they have, nevertheless, consistently achieved above the levels of expected achievement. It can be noted that Manual pupils achieved either at or above their expectancy on twenty-nine of thirty checkpoints. It is apparent that a good instructional program as well as effective pupil learning occur at Manual."

That year the actual median achievement level at Manual was the 29th percentile. PX 379.

[44] PX 379; Dodson, PH Tr. 313-314.

district's achievement reports emphasized test results in terms of expectancy rather than the grade equivalent which described the level where the children ordinarily would have been expected to perform. Often the expectancy was one or more grades below the grade equivalent. As noted above, the students and parents were reassured that the children were measuring up to their expectancy." With no comparable data readily available to them, minority parents had no way of finding out about the drastically low expectancies established for their children.

Mrs. Rachel Noel, only Negro to ever serve on the Board, recounted her experience with lower academic standards when at the fifth grade her daughter was transferred from predominantly-Anglo Park Hill Elementary School to predominantly-Negro Barrett when it opened in 1960. She noticed that her daughter had little homework and was losing interest at Barrett. Her daughter explained that she was being taught in the fifth grade at Barrett what she had already had in the fourth grade at Park Hill:

> "And I went to school and I talked to the teachers—to her teacher and I talked to the principal and—as a parent, trying to find out what it was. I sat in on the classes. And I wanted to see what it was. And to the best of my judgment and certainly my great concern based on her statements to me—it seemed that she was not getting what she should have gotten and what she would have gotten at Park Hill since she was having the same thing over in the fifth grade as she had had in the fourth." A. 87a.

Thus it was common, and still is, for minority children to be passed from grade to grade although falling farther and farther behind; entering first junior and then senior

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" PX 379.

high school with little hope that their academic performance would see them graduate from high school. As the school district observed when it was planning new Manual, the curriculum there had to reflect the fact that few if any Manual graduates would go on to college.[60] That expectancy had been established when the children entered elementary school. The prophecy was fulfilled.

I. Drop-Out Rates are Highest In the Segregated Schools.

Little wonder that the so-called drop-out rate for these minority secondary schools is so high.[61] In 1968 the prospects of finishing Manual High School for a minority child entering Cole Junior High School in the 7th grade were less than 23%; a child entering Morey Junior High School was even less likely to be graduated: only 18 out of every 100 would finish at East High School. The prospects of the combination of Baker Junior High School and West High School were little better: only 32 out of 100 would be graduated. A. 98a. Thus the system continuously creates another generation of future minority parents with a low level of education, and the cycle begins again.

J. The Trial Court Determined that a Cause of the Inequality was the Segregated Condition of the Schools.

The trial court found, as a matter of fact that the segregated schools were offering unequal and inferior educational opportunities to minority children. The trial court went on to find, as a matter of fact, that a cause of the inequality was the segregated condition of the school:[63]

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[60] PX 356: "For roughly three-fourths of the student body, college is virtually an impossibility." A. 961a.

[61] PX 400, 400-A; Bardwell, A. 776a-781a.

[63] Dodson, A. 1472a-1477a; PX 20, pp. 1-8, D-1-D-11 A. 1999a-2004a; A. 2008a-09a; PX 27; Dodson, PH Tr. 308-10; 312-315; 338-39.

"... [W]e cannot ignore the overwhelming evidence to the effect that isolation or segregation per se is a substantial factor in producing unequal educational opportunity." 313 F. Supp. at 81.

"When we consider the evidence in this case in light of the statements in *Brown* v. *Board of Education* that segregated schools are inherently unequal, we must conclude that segregation, regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity." 313 F. Supp. at 82.

"... Once it is found that these separate facilities are unequal in the quality of education provided, there arises a substantial probability that a constitutional violation exists." 313 F. Supp. at 83.

Finally:

"The evidence in the case at bar establishes, and we do find and conclude that an equal educational opportunity is not being provided at the subject segregated schools within the District. . . . The evidence establishes this beyond any doubt. Many factors contribute to the inferior status of these schools, but the predominant one appears to be the enforced isolation imposed in the name of neighborhood schools and housing patterns." 313 F. Supp. at 83.

In reaching this conclusion the trial court rejected the respondents' position that the inequality was in fact attributable to factors beyond their control, such as home environment, nutrition, educational level of parents, etc.[11]

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[11] Dodson, PH Tr. 339-43. Dr. Dodson characterized such excuses as being akin to "infant damnation", cliches which the majority community uses to excuse the failure to educate the minority child. PH Tr. 343-44.

K. The Respondents' Own Policies Resulted In Creating the Inequality of Opportunity.

While the respondents sought to put the responsibility for failure upon the minority children,[64] it is clear that many of the factors present in these schools which contribute to their inferiority are directly attributable to the policies and practices of the school administration.

The low level of teacher experience in these schools is the direct result of the respondents' policies regarding teacher assignment and teacher transfers.[65]

The high rate of teacher turnover in these schools is directly attributable to the respondents' teacher transfer policy.[66]

The teacher assignment policies for minority teachers, principals and assistant principals, concentrating them in minority schools, reinforced the image of those schools as segregated and inferior.[67]

The establishment of a low academic expectancy for the minority schools both created and reinforced the teachers' low expectancies, and became a self-fulfilling prophecy. The respondents' combined policies of failing to report comparative test data, the dissemination of misleading reports of test results and the passing of the children from grade to grade sought to justify the continuation of existing student assignment policies while at the same time dispelling the idea that there was a need for change.

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[64] Oberholtzer, A. 1329a-33a, A. 1357a-60a, A. 1362a-63a. 1970a-72a; Gilberts, A. 1710a-15a; A. 1831a-34a.

[65] Johnson, A. 308a-09a, A. 312a-17a, A. 320a.

[66] Johnson, A. 320a, A. 335a-36a.

[67] Johnson, A. 336a-38a; Oberholtzer, A. 1352a-53a, A. 1393a-97a; 303 F. Supp. 284-85.

Last, but by no means least, the respondents' adherence to the neighborhood school pupil assignment policy in the face of segregated neighborhood residential patterns knowingly continued to assign minority children to unequal schools.[44] As Judge Doyle said "It strikes one as incongruous that the community of Denver would tolerate schools which are inferior in quality." 313 F. Supp. at 83.

The trial court had abundant evidence to find the respondents responsible for the inequality of educational opportunity offered to Denver's minority students.

The Trial Court's Conclusions as to the Appropriate Remedy for the Inequality of Educational Opportunity.

After concluding that the inequality of educational opportunity violated the Fourteenth Amendment, the trial court next addressed itself to the issue of remedy. For this purpose an extensive separate hearing was commenced in May, 1970, at which the parties presented opposing plans for relief. Respondents advocated a remedy premised upon compensatory education, leaving the schools segregated. Petitioners' plans were premised upon three components: desegregation, integration and compensatory programs in a desegregated setting.

The trial court defined the issue before it as follows:

> The crucial *factual* issue considered was whether compensatory education alone in a segregated setting is capable of bringing about the necessary equalizing effects or whether desegregation and integration are essential to improving the schools in question and providing equality. The evidence of both parties has been directed to this question. 313 F. Supp. at 94.

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[44] PX 20, p. A-5 (A. 2003a); Oberholtzer, A. 1402a-03a, A. 1406a-07a, A. 1413a-14a; Perrill, A. 1088a-90a.

The trial court, after considering the evidence presented, resolved this issue in favor of the remedial components presented by petitioners:

> We have concluded after hearing the evidence that the only feasible and constitutionally acceptable program —the only program which furnishes anything approaching substantial equality—is a system of desegregation and integration which provides compensatory education in an integrated environment. 313 F. Supp. at 96.

In support of this conclusion were the following findings by the court:

1. The evidence was "overwhelming" that equality "can only be brought about by a program of desegregation and integration. 313 F. Supp. at 96."

2. "... [T]he segregated setting stifles and frustrates the learning process," and deprives the minority students of the benefits of a heterogeneous group of fellow students. 313 F. Supp. at 96-97.[70]

3. Compensatory programs, both nationally and in Denver's segregated schools have been uniformly unsuccessful, and the programs espoused by the respondents showed no greater promise. 313 F. Supp. at 97.[71]

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[69] Dodson, A. 1472a-74a; Sullivan, A. 1570a-71a; A. 1573a-80a; A. 1585a-87a; A. 1598a-1600a; Coleman, A. 1531a-37a, A. 1539a-44a, A. 1551a-52a; RH Tr. 74-75; O'Reilly, A. 1935a-41a, A. 1950a-55a.

[70] *Ibid.*

[71] O'Reilly, A. 1910a-35a; Reamer, A. 1905a-10a; Ward, A. 1853a; A. 1868a-69a, A. 1873a-74a, Morrison, A. 1890a, A. 1893a-94a; Gilberts, A. 1817a-18a, A. 1822a, A. 1827a-29a, A. 1831a-34a.

The evidence at the hearing on relief centered upon the issue of whether, standing alone, compensatory education programs in the court-designated schools would raise the quality of the educational opportunity which they offered. Petitioners' experts uniformly asserted that these compensatory programs carried out in segregated settings had failed to significantly affect or improve achievement levels of the minority children.

Dr. James Coleman stated that studies of the effects of these compensatory programs "have not been very encouraging with regard to their effects." A. 1537a. Coleman summed up the weakness of these programs as follows:

> I think that the major problem with compensatory programs is that it's much more difficult and, if possible, much more expensive to introduce such environmental changes in the child's environment, not only within the classroom but outside the classroom when the actual social environment that he experiences in the sense of other children he talks to remains homogeneous with his past. A. 1543a.

The practical experience of Dr. Neil Sullivan while Superintendent of Schools at Berkeley, California, confirmed the thesis of the ineffectiveness of compensatory programs in segregated settings.

For four years prior to the institution of the desegregation of Berkeley's schools the district had attempted to improve the segregated schools, nearly doubling the tax rate "in order to have many, many millions of dollars to pour into these black schools." Emphasis was placed on lowering class size, new electronic equipment and materials, the use of para-professionals, cultural enrichment programs, and programs designed to build the minority child's

self-esteem. As Sullivan said: "You name it and we tried it." A. 1577a. Despite these efforts the programs "had no effect" upon minority achievement, and "overall there was retrogression in all the black schools in achievement." A. 1578a. Sullivan reached the conclusion that the best compensatory education program was integration. A. 1576a.

Dr. Sullivan also testified as to how integration in Berkeley solved many of the problems of teacher turnover and low teacher experience. Teachers enjoyed teaching in an integrated school and stayed with the system. A. 1585a. Classroom discipline problems which had inhered in the segregated black schools were greatly alleviated. A. 1586a. Integration had no adverse effect upon Anglo achievement and unlike the experience with compensatory programs, minority achievement improved.

Dr. Robert O'Reilly also presented evidence about the lack of efficacy of compensatory programs in segregated settings. O'Reilly was Chief of the Bureau of School and Cultural Research for the New York State Education Department, and as such had directed a study of the efficacy of segregated compensatory programs throughout the United States. More than 1,200 different programs had been reviewed and evaluated. The results of these comprehensive evaluations were published in 1970, appearing in the record here as PX 508, "Racial And Social Class Isolation in the Schools."

The respondents' proposals for compensatory education then before the trial court included elements such as additional teaching staff, lowering of teacher-pupil ratios, use of paraprofessionals and teachers' aides, diagnostic laboratories, group counseling, use of staff psychologists, cultural understanding programs, programs directed toward improving the child's self-image, increasing parental in-

volvement, remedial reading and mathematics, programs designed to motivate minority children and to make the curriculum more relevant, use of multimedia teaching aids, field trips and differentiated staffing.

O'Reilly testified that the 1,200 programs he had studied typically had these elements; that there was really nothing new or innovative about the respondents' proposal. Further, it was his opinion that segregated compensatory programs did not raise minority achievement:

> My opinion is, after reviewing the studies and their results that there are no general practical effects accruing to students' educational development as a function of compensatory education programs which typically include these kinds of components. A. 1929a.

O'Reilly had also studied and evaluated the effects of integration upon minority achievement. Based upon analysis of some forty integration programs, it was his opinion that integration improved minority achievement. While not recommending any "doctrinaire approach," [72] and stating that integration was not a "cure-all," [73] O'Reilly concluded:

> . . . [T]he results generally show that the educational development of the desegregated minority students tends to be facilitated or tends to improve within a year or two after the desegregation experience is initiated. A. 1937a.

Comparing the effect of segregated compensatory programs with integration,

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[72] A. 1933a.

[73] A. 1935a.

> . . . [T]he results here tend to show that the integrated students perform at higher levels on achievement tests as compared to students in segregated schools receiving compensatory education. A. 1937a.

The principals at three minority schools, Greenlee Elementary, Cole Junior High and Manual, had testified that they believed compensatory programs in their schools were effective. O'Reilly dismissed this attitude as being typical:

> I don't think you can judge [the effectiveness of these programs] from what a person has to say about his opinions. Teachers typically and school administrators typically think what they're doing is great. A. 1956a.

This opinion was borne out by Denver's experience with compensatory programs. None of them had any demonstrable effect upon minority achievement. Mr. Ward, principal at Manual, described the programs he had established beginning in September, 1966, when he became principal.[74] While he was enthusiastic about these programs[75] he admitted that during this period the level of academic achievement at Manual declined from the 34th percentile in 1965 to the 28th percentile in 1968.[76]

In its opinion of May 21, 1970 (313 F. Supp. 90), the trial court did not decree a specific remedy or plan for implementation, but rather established guidelines which the detailed plan would have to meet. These included desegregation of 7 of the 14 court-designated elementary

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[74] A. 1845a-1853a.

[75] A. 1853a.

[76] A. 1874a.

schools in September, 1971; desegregation of the remaining 7 schools in September, 1972; desegregation of Baker and Cole Junior High Schools commencing in September, 1971, with implementation to be completed by the following September. By September, 1972, Manual Senior High School was to be transformed into a city-wide open school with offerings emphasizing vocational education and pre-professional training. 313 F. Supp. at 97-99.

In addition to desegregation the trial court's guidelines included integrative programs directed to the attitudes of teachers, parents and children; orientation in the fields of minority cultures, teaching programs relating to minority children in an integrated environment and community education about the educational benefits of the desegregation program. Finally, the court accepted the compensatory programs recommended by respondents, but in the setting of integrated rather than segregated schools. 313 F. Supp. at 99.

Events Subsequent to the Trial Court's Opinion of May 21, 1970.

The details of the plans necessary to implement the desegregation called for in the guidelines was left for the parties to mutually resolve. By March, 1971, the board drew up six alternate plans for desegregation of 7 of the fourteen designated elementary schools. Each of the six plans used a different combination of minority schools; each also used a different group and quantity of predominantly Anglo receiving schools. All six plans were based on the concept of satellite zoning, whereby portions of the minority schools' attendance areas were carved up and assigned to Anglo schools. After a series of public meetings the board later selected one of these, "Plan B," for presentation to the court.

At the secondary level the board proposed to desegregate Baker, and to make both Cole and Manual "magnet schools."

All of the proposals were represented to be workable, reasonable, and within the financial and administrative capabilities of the school district. The board also represented that it could implement their proposals by the September, 1971 deadline established by the court.

Being unable to agree with most of the board's proposals, the petitioners developed several alternate pairing proposals for the desegregation of the fourteen minority elementary schools, pairing them with quality predominantly Anglo schools. At the secondary level petitioners developed proposals for the desegregation of both Baker and Cole. Petitioners adopted the magnet concept for Manual.

In May 1971, a second relief hearing was held, and the opposing plans were presented. At the close of the hearing the court selected a plaintiffs' modification of one of the board's six alternate elementary plans, and adopted the board's proposals for Baker, Cole and Manual.[11] All of these plans were to be implemented in September, 1971.

A few weeks later, the issuance of the opinion of the court of appeals on June 11, 1971, nullified the implementation of these remedial orders. 445 F.2d 990.

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[11] No appeal was prosecuted from the oral order of the trial court at the close of the second relief hearing, and no review of that proceeding is sought in this Court. The original transcript of that hearing has been filed with the Clerk of the Court.

Events Subsequent to the Issuance of the Court of Appeals Opinion on June 11, 1971.

While not relevant to the issues here, for the sake of completeness we will relate the other judicial action which took place following the Court of Appeals decision.

That decision affirmed the trial court's conclusion that the Hallett and Stedman elementary schools had been intentionally segregated by the board. Those schools received no relief under that portion of the trial court's orders which were affirmed by the Tenth Circuit, as they were not included in Resolution 1531. On June 23, 1971 petitioners requested the trial court to order respondents to file a desegregation plan for Hallett and Stedman to be implemented with schools' opening in September, 1971. Respondents opposed this motion, and the trial court on July 28 denied it without prejudice, stating that it was unclear from the decision whether such relief was contemplated by the Court of Appeals. On August 2 petitioners filed a "motion seeking clarification" of this question, and on August 30 the Court of Appeals issued an order stating that such desegregation relief would be appropriate and directing the trial court to hear the matter "and determine the proper relief to be granted." A. 1986-87a.

At the trial court's hearing on September 8, 1971 the court selected plans for Hallett and Stedman and ordered them to be implemented by November 8, 1971. The order was reduced to writing and entered on September 28, 1971. Thereafter, respondents' notice of appeal was voluntarily dismissed when pursuant to stipulation the order was modified and implementation rescheduled. The new order, entered October 19, 1971, was implemented at the beginning of the second semester in January, 1972.

Summary of Argument

Petitioners are seeking a district-wide plan of relief for segregation and inequality of educational opportunity in School District No. 1. In support of this relief, petitioners contend as follows:

I.

A. That the findings of the trial court as to a ten-year segregation policy affecting a substantial part of the Denver system, which findings were affirmed below, justify and necessitate a plan of relief which is not limited to the few schools which were most recently and overtly affected by this policy. While the courts below thus restricted the remedy, it should be extended to the entire Denver District. Only system-wide relief promises to effectively remedy the effects of the past discriminatory policy and to prevent its reoccurrence in the future, particularly where the District's segregatory practices in the past have been carried on covertly under the cover of a racially-neutral, "color blind" neighborhood school policy.

B. The courts below employed erroneous notions of petitioners' burden of proof on the issue of purposeful segregation by not requiring that respondents justify their segregatory actions by showing them necessary to achieve a compelling, nonracial state objective. If this proper standard had been applied, the record here required a finding of even more purposeful segregating action than was found by the courts below. The courts below erred and saddled peitioners with an impossible burden of proof by taking as excuse or justification for segregatory effects any merely *rational* nonracial excuse which respondents offered. This error was particularly palpable as applied to the evidence of boundary changes increasing the attendance areas of Cole Junior High School and Manual Train-

ing High School to include and coincide with the areas of most recent Negro neighborhood expansion. Similarly, the courts below ignored the record as well as common experience by refusing to give effect to the impact of schools decisions upon the racial composition of affected neighborhoods, thus allowing later neighborhood segregation to excuse prior segregatory acts because there was no direct and immediate causal relationship. The court below also ignored the impact of faculty segregation practices.

C. Where the school authorities have been found guilty of intentional segregation as to some actions, other actions having a similar segregatory result should not be clothed with any presumption of legitimacy but rather should be considered prima facie illegal unless justified by the showing of a nonracial compelling state interest. Had the courts below employed this test it would have compelled a finding of more pervasive segregation throughout the system, further justifying the necessity for district-wide relief.

II.

With regard to the unequal educational opportunity systematically being provided to Denver's minority students, the trial court properly held such deprivation to constitute denial of equal protection and fashioned an appropriate remedy for it, in light of the evidence and the traditional powers and duties of a court of equity. While the remedy was proper, it was improper to withhold it from other minority schools displaying the same inequalities and inferiority as those to which the trial court extended relief.

In reversing, the appellate court misconceived the standards of equal protection which applied, requiring a show-

ing that the State had deprived minorities of equal educational opportunity intentionally, that is to say, with odious intent, whereas all that is required is a showing that state action has resulted in a racial discrimination. If not justified by compelling state interest, the racial discrimination will deny equal protection. Furthermore, the appellate court's inability to find that the inequality was the result of any state action was derived from ignoring the variety of decisions made by the school administrators which contributed to the inequality of opportunity in and the inferiority of these minority schools. The Tenth Circuit also either rejected the trial court's evidentiary findings as to the cause of the inequality in violation of the "clearly erroneous" standard of Rule 52(a), or it incorrectly concluded that the district court had employed a *per se* rule of equating segregation with inequality, whereas Judge Doyle's finding was essentially factual and fully supported by the evidence.

III.

Finally, the combination of the two constitutional violations found by the trial court should be remedied together in a comprehensive, district-wide plan.

ARGUMENT

I.

Racial Segregation in the Denver School System Violates the Fourteenth Amendment and Should Be Remedied by a Comprehensive System-Wide Desegregation Plan.

Introduction

This case presents the situation of covert racial segregation practiced by state officials in violation of the state's own laws[18] as well as this Court's ruling that "racial discrimination in public education is unconstitutional." *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and 349 U.S. 294 (1955) (*Brown II*). Colorado law lends no support to a practice of racial segregation or discrimination. Indeed, Colorado's Supreme Court held in 1927 that a Denver practice of excluding black students from school programs at Manual High School and Morey Junior High violated state law. *Jones* v. *Newlon*, 81 Colo. 25, 253 Pac. 386 (1927). At the time of *Brown*, Denver had no fully developed "dual system" of entirely separate schools for blacks and whites but black pupils in Denver were concentrated in a few schools.[19] The Superintendent

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[18] An example of similar violations soon after *Brown* is *Clemons* v. *Board of Education of Hillsboro*, 228 F.2d 853 (6th Cir. 1956).

[19] The most complete data in the record about the pre-*Brown* distribution of pupils in Denver by race is data for the 1946-47 school year. PX-336, A. 2084a. There were only 1,832 Negroes (3.6%) in a school system of 50,999 regular daytime pupils. Nevertheless, the concentration of Negroes in three elementary schools, one junior high and one senior high was severe. Whittier Elementary School was 90% black and enrolled 50% of the black elementary students in Denver. It was the first, and until 1944 the only school to have any black teachers. A. 2106a, PX-410. Mitchell had 13% and Gilpin had 12% of the black elementary

of Schools concluded, despite this racial concentration, that the *Brown* decision "did not apply to us" (A. 1400a) but only applied to "separate school systems for the Negro and the Anglo. A. 1310a. Superintendent Oberholtzer took the view that no racial statistics should be maintained (A. 1399a), and that it violated the Colorado Constitution to take any action to relieve the concentration of Negroes in Negro schools. A. 1370a. It never occurred to the Superintendent to inquire whether the practice of assigning minority teachers to minority pupil schools violated the state or federal Constitution.[10] But see *Swann* v. *Board of Education*, 402 U.S. 1, 18 (1971); *United States* v. *Montgomery County Board of Education*, 399 U.S. 225 (1969); *Bradley* v. *School Board*, 382 U.S. 103 (1969); *Rogers* v. *Paul*, 382 U.S. 198 (1969).

Notwithstanding the board's denials of racial motivation and vigorous defense to the charge, the district court concluded that the Denver authorities "carried out a segregation policy" during a ten year period up until the filing of this lawsuit in 1969. 303 F. Supp. at 287. The findings of deliberate acts designed to accomplish racial segregation, which were affirmed on appeal, are all the more remarkable considering the strict burden of proof

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students; both latter schools were predominantly minority (Hispano and black) schools. Cole Junior High was 20% black and enrolled 88% of the blacks in Denver junior high schools. Manual Training High was 23.4% black and 86% of the blacks at the high school level attended this one school.

[10] Article IX, Section 8 of the Colorado Constitution provides: "Section 8. Religious test and race discrimination forbidden—sectarian tenets.—No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color."

placed on plaintiffs by the courts below which decided that only a showing that board action was a sham or subterfuge and that no rational criteria could support a given board action would suffice to establish sufficient circumstantial evidence to prove an intent to segregate.

The courts below regarded this deliberate policy of segregation carried out by official acts of local school officials as a plain violation of *Brown*. That result is consistent with the view of other courts which have condemned segregation resulting from covert policies of administrative officers and local school boards as unconstitutional in a growing body of decisions.[31] This Court has several times taken note of the policies of resistance and evasion of *Brown* which developed in southern states in the years since 1954. *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Griffin* v. *School Board*, 377 U.S. 218 (1964); *Swann* v. *Board of Education*, 402 U.S. 1, 13 (1971). The pattern of covert racial discrimination in the Denver schools revealed by this record merits equally vigorous condemnation.

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[31] *Taylor* v. *Board of Education of New Rochelle*, 191 F. Supp. 181 (S.D.N.Y. 1961), *appeal dismissed*, 288 F.2d 600 (2nd Cir. 1961), 195 F. Supp. 231 (S.D.N.Y. 1961), *aff'd*, 294 F.2d 36 (2nd Cir. 1961), *cert. denied*, 368 U.S. 940 (1961); *Clemons* v. *Board of Education of Hillsboro, Ohio*, 228 F.2d 853 (6th Cir. 1956), *cert. denied*, 350 U.S. 1006 (1956); *Davis* v. *School District of City of Pontiac*, 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971); *Bradley* v. *Milliken*, 433 F.2d 897 (6th Cir. 1970), 438 F.2d 945 (6th Cir. 1971), —— F. Supp. —— (E.D. Mich. Sept. 1971); *United States* v. *School Dist. No. 151*, 286 F. Supp. 786 (N.D. Ill. 1967), *affirmed*, 404 F.2d 1125 (7th Cir. 1968), *on remand*, 301 F. Supp. 201 (N.D. Ill. 1969), *affirmed*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *United States* v. *Board of School Commissioners of Indianapolis*, 332 F. Supp. 665 (S.D. Ind. 1971); *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970).

In Part I-A of this Brief, we submit that the district court's findings of various acts of unlawful segregation which were affirmed on appeal are sufficient to require that Denver be dealt with as a segregated school system and require that the courts in the exercise of their remedial function provide system-wide relief and not merely relief limited to certain individual school situations.

In Part I-B we urge that the unlawful segregation practices in Denver were even more extensive than the courts below found and that findings that segregation at some schools was not unlawful were based on the application of wrong legal standards and perspectives.

In Part I-C we suggest that where intent to segregate has been demonstrated as to some of the board's actions, other decisions whose effect is segregatory should be presumptively unlawful unless supported by a compelling nonracial justification and not merely an available nonracial explanation.

A. Denver's Unconstitutional Ten Year Policy of Racial Segregation Necessitates a Requirement for System-wide School Desegregation.

The district court found that the Denver officials had carried out a ten year policy of racial segregation in the Denver schools. Although the principal findings related mainly to eight schools, the findings establish systemic discrimination which affected the entire black school population. Racial discrimination in the assignment of black teachers was shown to have been system-wide and to have been the policy[22] since the first black teacher was hired in 1934 (PX 410, A. 2106a). The eight schools upon which the district court focused the findings of unlawful discrimination enrolled 5,139 black children, more than a

[22] See Statement *supra*, pp. 11-13, 19-21.

third of the black children in the City, including one-fourth of black elementary children, over two-thirds of the black junior high pupils and two-fifths of black high school pupils.[33] Thus, the findings of deliberate manipulations to accomplish segregation do not pertain to an isolated or trivial fragment of the system. Rather, they relate to a substantial part of the black community including the community where black population growth was concentrated and where there was thus the most opportunity for discrimination during recent years.

The findings of discrimination relate to all of the mechanisms by which the system controlled pupil assignment. Racial segregation was the hidden motive of Denver school officials and their undeviating policy when they made decisions affecting the Northeast Denver schools about such matters as size and location of new buildings and additions to buildings, capacity utilization, location of mobile classrooms, transportation policies, attendance area boundary decisions, optional zones and transfer policies. See Statement, *supra* at pp. 13-37; see also Argument II, *infra* at 93-101.

The interrelation of assignment practices at various schools is an obvious and established fact. As a former board president who testified for the defendants put it, "Once you change the boundary of any one school, it is affecting all the schools and so we had a concern about all of these changes." A. 951a-952a. It is equally obvious that a practice of concentrating blacks in certain schools by structuring the pupil assignment process with racial considerations has a reciprocal effect of keeping other schools all white. Furthermore, such a policy is aimed at Negroes as a racial group and not merely at particular

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[33] See footnote 13, *supra*, p. 17.

Negroes. Discrimination in Denver was against blacks as a group although it was manifested in different ways against blacks in different situations. The ten year segregation policy was effective everywhere in Denver that it was needed to accomplish segregation. In Park Hill where blacks were moving into white neighborhoods in the 1960's the segregation policy was most overt and visible. Naturally it was less visible where schools were already segregated, and nothing new needed to be done to keep them segregated.

Plaintiffs have sought system-wide relief from the filing of the complaint which asked that the board (A. 31a-32a):

> . . . be required to submit . . . a comprehensive plan for the School District as a whole, and for each school therein where such condition exists, which will effectively:
>
> (i) Remove the segregation and separation of school children by race and ethnicity within and among such schools;

The piecemeal approach of trying to cure segregation at only those schools where there is proof of a deliberate policy of segregation and leaving other schools segregated is plainly inappropriate where the segregation is a part of a policy which inevitably affects all students and schools, white or black, either directly or indirectly. Such a piecemeal approach might be appropriate if an act of deliberate discrimination was truly isolated and unconnected with the rest of a school system. But the district court's findings of a segregationist *policy* negate any such notion in Denver.

The rescission of the three 1969 desegregation proposals which would have changed attendance patterns at schools

attended by one-third[24] of the children in Denver was the "climactic and culminative act" of the board's segregation actions and there was "no gainsaying the purpose and effect of the action as one designed to segregate." 308 F. Supp. at 285. The district court found that the rescission of Resolutions 1520, 1524 and 1531 was an action of deliberate racial segregation entirely unrelated to any nonracial considerations, done in haste, without study, without any nonracial educational justification, and over the opposition of the school superintendent. Judge Doyle wrote:

> The rescission of Resolutions 1520, 1524 and 1531 was a legislative act which had for its purpose restoration of the old status quo and was designed to perpetuate segregation in the affected area. This act in and of itself was an act of de jure segregation. It was unconstitutional and void. 303 F. Supp. at 295.

The rescission of the three resolutions demonstrates a general policy of segregation affecting schools in every part of Denver which would have been involved in the desegregation effort planned by the Superintendent and were left segregated by the rescission.

Petitioners do not read the district court's final decision on the merits as rejecting the idea of system-wide relief. To be sure the court held that plaintiffs failed to prove deliberate discrimination as to certain schools in regard to boundary changes and optional zones. But the court simultaneously ordered desegregation of those and other schools on another theory—the inequality theory discussed in Part III of the opinion (313 F. Supp. at 77,

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[24] See chart at 445 F.2d 1008-1009, which indicates that 31,767 pupils would have attended the schools involved in Resolutions 1520, 1524 and 1531 if they were implemented.

et seq.)—and thus had no need to decide whether desegregation of those same schools might not be required to remedy the effects of the board's general policy of discrimination or prevent it from being carried forward in the future.

We submit that it ought to be entirely obvious that school segregation resulting from shams, subterfuges and surreptitious practices can only be rooted out and prevented if equity courts approach the problem of eliminating the effects of past discrimination and preventing future discrimination with a view to the practicalities of the situation. It has long been accepted that it is necessary to adopt a pragmatic approach to eleminating dual systems created by state laws because of the problems courts have encountered in enforcement of the *Brown* decision. See, *e.g., Green* v. *County School Board*, 391 U.S. 430, 438, n. 4 (1968); *Swann* v. *Board of Education*, 402 U.S. 1, 26 (1971). A fortiori there is need for a similarly practical view and for remedial action extending beyond the narrow area of proven violations in the case of a school district with a history of segregation by underhanded subterfuges. There might once have been some room for assumptions that dual school systems would generally obey *Brown* with good faith efforts, but there is by definition no basis for any such assumptions about a school district which has been found guilty of deliberate violations of *Brown* by covert segregation practices.

In the *Green* case, the Court cites precedents in voting rights, labor law and anti-trust cases as supporting the duty of an equity court to "eliminate discriminatory effects of the past as well as bar like discrimination in the future." *Green, supra*, 391 U.S. at 438, n. 4. Similarly well-established remedial principles support the notion that an equity court ought to attempt a remedy for school segregation

created by sham and subterfuge which looks beyond the particular cases of proven illicit activity.

In enforcing the anti-trust laws the federal courts have, because of practical necessities of enforcement, ranged beyond the narrow area of proven violations and where necessary enjoined licit as well as illicit conduct in order to enforce the law. See, *e.g.*, *United States Gypsum Co.* v. *National Gypsum Co.*, 352 U.S. 457 (1957); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 724 (1944); *United States* v. *U.S. Gypsum Co.*, 340 U.S. 76 (1950); *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *Los Angeles Local 626* v. *United States*, 371 U.S. 94 (1962); *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2nd Cir. 1945) (opinion by Judge Learned Hand).

The practical necessity of a district-wide approach to school segregation in Denver stems from various aspects of the situation. One aspect is the presence in the school system of the large Hispano minority group. It is necessary to avoid a remedy for segregation against blacks which disadvantages Hispano. The problem is obvious considering the fact that the dominant Anglo community can remain separated from blacks either by keeping blacks in all-black schools or keeping them in Black-Hispano schools. The current existence of a number of Black-Hispano schools where the pattern of inequality of educational opportunity is identical to that in all black schools is discussed below in Part II-C. A piecemeal approach to correcting the constitutional violations caused by deliberate discrimination might either aggravate the segregation of blacks and Hispanos or lead to the segregation of Hispanos in all-Hispano schools.

Another problem of a remedy without a system-wide perspective is to avoid steps which tend to create or encourage white citizens to change their schools to remain

segregated. Planning with a system-wide perspective can attempt to deal fairly with all groups and segments in the community and attempt to insure that any remedy is one with some chance of permanent impact.

Covert segregation practices in the past have obviously set in motion community responses. On the simplest level where a school is designated as a black school this may often cause various types of responses by whites to avoid the school thus designed as a black school. Furthermore, the systematic segregation of blacks in schools outside the older black areas demonstrates to blacks living in the older core areas the futility of seeking to escape school segregation by moving. Mrs. Palicia Lewis, a black parent, testified about her family's move from the predominantly minority Ebert in the central city to the Smith area in Northeast Denver at a time when Smith was integrated. As Smith became crowded and predominantly black, she and other Smith parents were offered the choice of accepting mobile classrooms at Smith to contain the new black pupils moving into the area or being bussed—possibly back to Ebert from which she had just moved. A. 691a-697a. The Northeast Denver segregation policy inevitably affected black people in the core city area. It gave them a signal that they would be in segregated schools no matter where they lived in Denver.

Only a systematic approach involving many schools can undertake to eliminate the racial identifiability of a few schools. See, for example, the large number of Anglo schools involved in the Resolution 1531 (A. 60a) plan to desegregate a few black schools. We should also point out that the fact that Resolutions 1520, 1524 and 1531 did not address the entire school system, reflects only that when the board was planning for integration it did so on a step-by-step basis. The board's Noel Resolution contemplated

"a comprehensive plan for the integration of the Denver Public Schools" (A. 1991a), and Superintendent Gilberts' responsive submission "Planning Quality Education" (DX-D; excerpts at A. 2128a, *et seq.*) envisioned an approach which would comprehensively address the problems of the entire school district. Resolutions 1520, 1524 and 1531 were the first three beginning steps in the overall process of designing a plan for integrating the Denver schools. A. 227a-239a.

Moreover, a system-wide approach is necessary in view of the need for a desegregation plan which also operates to relieve the problems of inequality in the provisions of resources to minority schools (see Argument II, *infra*). Such problems as high teacher turnover and low teacher experience in segregated schools as well as the concentration of minority teachers in minority schools are all problems which suggest that a district-wide remedial plan is necessary and appropriate.

We submit that the court of appeals erred in reversing those parts of the district court's final decree which did not relate specifically to schools where there was a finding of deliberate illicit acts. A rule of law limiting the remedy for school segregation to only those schools in a system where specific illicit acts are proved is so impractical as to promise no real reform of segregated situations. Such a limited remedy is comparable to the long-rejected arguments in dual school systems that courts were empowered only to grant relief to individual named plaintiffs who sued for admission to specific white schools. If such a rule of law had prevailed, segregation would still be the way of life in southern school systems. That dual systems have been considerably alleviated is due to the practical approach mandated by *Green* v. *County School Board*, 391 U.S. 430 (1968). Only a similar practical approach

can have any appreciable impact on segregation accomplished by surreptitious and underhanded practices.

B. Unlawful Segregation in Denver Is Even More Extensive Than the Courts Below Recognized.

The decisions of the courts below actually understate the extent of the unlawful racial segregation shown on this record to have been accomplished by decisions of the Denver school authorities. The courts below erred by giving the wrong legal significance to discriminatory acts of the board which occurred prior to the *Brown* decision, and also by excusing some discriminatory actions on the ground that plaintiffs failed to show that the past discriminatory conduct was the cause of present segregated patterns.

Plaintiffs' position is not based on a challenge to the particulars of the district court's fact finding. Rather, we challenge a few of the mixed factual and legal conclusions (or middle level facts) which are determinative of the constitutional issue. We invoke the principle that this Court makes its own independent examination of a record to insure that federal rights are not lost because of distorted fact-finding, or fact-finding influenced or induced by erroneous principles of law. *Haynes* v. *Washington*, 373 U.S. 503, 515-517 (1963); *Spano* v. *New York*, 360 U.S. 315, 316 (1959); *Stein* v. *New York*, 346 U.S. 156, 181 (1953).[11] We submit that such legal errors plainly affected the decision that certain segregation in Denver was lawful.

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[11] See *Oyama* v. *California*, 332 U.S. 633, 636 (1948):

> "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

Manual Training High School is the capstone of Denver's segregated pattern. The evidence that New Manual was earmarked for black students when it was opened in 1953 is overwhelming. It comes from the mouths and documents of the school officials. See, *e.g.*, PX-356; excerpts at A. 2086a. See Statement, *supra*, pp. 22-24. Former Superintendent Oberholtzer's testimony about the planning for New Manual makes the point:

> Q. Was there any doubt in your mind that, when new Manual opened, Doctor, it would be predominantly minority in its composition? A. It appeared to be so at that time, yes.
>
> • • • •
>
> Q. Now, did you consider what might happen to the racial composition of new Manual in the event you had built it larger, for example, during the planning stages for new [2030] Manual? A. Racial factors and ethnic factors were not a part of our consideration in the construction or location of schools.
>
> Q. And I take it your answer is the same with regard to a possible change in the boundary between what has been that for old Manual and that for new Manual? A. I would give you the same answer.
>
> Q. Well, you're not telling me, are you, Doctor, that you were in fact, when you built Manual, building a separate but equal school, are you? A. I don't know the import of this question.
>
> The Court: What he's asking you is, just so I think you will be aware, is whether this was built to be a Negro school and planned as such, although you were determined, undoubtedly, to give it equal facilities. That's the essence of what he's asking you.
>
> Mr. Greiner: That's correct.

A. We were again building a school to house the children of that particular area, and there was, as you have said, a high percentage of Negro pupils in that area, yes.

Q. Well, for example, the whole curriculum at Manual was tailored, was it not, for these minority students? A. It was tailored to the students who were attending [2031] that school, yes.

Q. And those were minority students. You don't deny that, do you? A. No, I'm not denying it. (A. 1406a-1407a).

See also similar testimony at A. 1404a-1405a.

The evidence about the subsequent boundary changes at Manual, about the optional zones, about the capacity utilization of Manual and East and about the curriculum at Manual "tailored for minority students" is all set out in great detail in other parts of this Brief and will not be repeated here. See pp. 22-24, 29-30, 31, 33-35 *supra*. Manual has at all relevant times been *the* black high school in Denver.[46]

The district court's ruling on plaintiffs' contentions about Manual was that (1) it was opened prior to the *Brown* decision, the location had the consent of the people in the neighborhood and at that time there was "much less concern about minority concentration" (313 F. Supp.

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[46] In 1946-47, Old Manual had 86% of the City's black high school students and in 1968-69 it enrolled 49% of the black high school students. In 1947-48 the black students were 2.9% of the high school population in the District and the black students at Manual were 23% of the total. In 1968-69, black students were 12% of the high school population and the black students at Manual were 76% of the total. See PX 336, A. 2084a and PX 302, A. 2078a. In 1949, Manual became the first Denver high school to have a Negro teacher. PX 410, A. 2106a. In 1968-69, Manual had 25 of the 44 Negro high school teachers. PX 275, A. 2075a.

at 69-70); and (2) the 1956 boundary changes at Manual cut off the option of some blacks at Manual to attend East and was resisted by the black community which proposed changes that would integrate Manual, but this integration "would have been temporary only because in a few years this neighborhood became Negro" 313 F. Supp. at 70. The court made no finding that the decisions about locating Manual or changing its boundaries were rational, neutral or legitimate. It merely said plaintiffs did not show the "acts were clearly racially motivated" and that much of the black population concentration in the area occurred in later years between 1963 and 1968.

The district court restated the first point listed above elsewhere in the opinion:

> It should also be kept in mind that prior to Brown v. Board of Education, *supra*, it was apparently taken for granted by everybody that the status quo, as far as the Negroes were concerned, should not be disturbed because this was the desire of the majority of the community. Time and again the Board members testified to the fact that in making decisions they held hearings and finally bowed to the community sentiment. Thus, they say they did not intend to segregate or refuse to integrate. They just found the consensus and followed it. 313 F. Supp. at 73.

We believe that this repeated reference by the court to the acceptance of racial decisions and racial concentration of Negroes in schools prior to *Brown* represented a confused and incorrect approach to the problem presented.[87] The district court should have sought to determine whether the board intentionally made racial decisions and discriminated.

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[87] This aspect of the decision below is discussed in Comment, 48 Denver L. J. 417 (1972).

Instead, the court seems satisfied that the board did not intentionally violate the "law of the land" prior to *Brown* when "there was much less concern about minority concentration." 313 F. Supp. at 70. This kind of approach would not even have desegregated a southern dual system.

The district court's finding of no racial motivation with regard to the establishment of Manual is explicable only in terms of this kind of legal error. The trial court reached precisely the opposite conclusion on substantially similar—perhaps weaker—facts with respect to the 1959 establishment of Barrett. The establishment of Barrett was seen by the trial court as plainly unlawful because it occurred after the *Brown* decision. See 303 F. Supp. at 284-285. The establishment of Barrett may have been more blameworthy than the establishment of Manual because one occurred before and the other after *Brown*. But both cases involved the establishment of a school designed to fit a racial population group and planned to be segregated. Both are in "the classic pattern of building schools specifically intended for Negro or white students." *Swann* v. *Board of Education*, 402 U.S. 1, 21 (1971). Both are equally unlawful under *Brown*.

The district court's other point about Manual boundary decisions not causing segregation reflects another error of law. It seems clear that there was no rational neutral justification for the 1956 Manual-East boundary changes and the district court found none. (The same boundary changes applied to Cole and Smiley Junior High Schools and the board's explanation in that case that it was related to the new Hill Junior High School was found by the district court to be false. 313 F. Supp. at 71, n. 14.) The district court found that the Manual boundaries followed the black population and that alternatives proposed by the

black community but rejected by the board would have alleviated crowding at East while desegregating Manual. 313 F. Supp. at 70. However, the court found that assigning a white neighborhood to the Manual zone would have had an integrating effect at Manual but it "would have been temporary only because in a few years this neighborhood became Negro." 313 F. Supp. at 70.

The court's reasoning ignores the effect of such boundary decisions and decisions to designate a school as black on neighborhood residential patterns. Schools decisions change neighborhoods. This Court pointed out in *Swann* v. *Board of Education*, 402 U.S. 1, 21 (1972), the interrelationship between school establishment decisions and neighborhood patterns, and that a segregation policy "may well promote segregated residential patterns which, when combined with 'neighborhood zoning', further lock the school system into the mold of separation of the races."

The United States Commission on Civil Rights has observed the same relationship. PX-27, Racial Isolation in the Public Schools, A Report of the U. S. Commission on Civil Rights, 1967. Plaintiffs' expert Dr. Dodson testified about the phenomenon of school policies being a major cause of housing segregation:

> . . . I would also say that policies of schools become a factor, too. I was in a case in Little Rock, Arkansas, in the federal court on desegregation and here the board's policy of ringing off their school and the next one to it as the neighborhood expanded as being black schools and so on, meant that the housing arrangement —the schools' policies created segregated patterns within the city itself and was the major contribution to the segregation within the residential pattern of living. A. 1505a

See also A. 1490a-1491a. The experience of various black Denver residents who testified at the trial confirmed aspects of the interrelationship between school segregation and housing segregation.[28] A policy of establishing segregated schools in neighborhoods where blacks move in, does more than encourage whites to move out—the familiar white flight pattern. Such segregation also demonstrates to blacks that wherever they move they will be segregated and tends to further impact segregation in established black residential areas.

This relationship is also the answer to the district court's reliance on the fact that the Negro population at Manual and Cole increased over 20 percent between 1963 and 1968 —long after the boundary changes and during a period when the board was engaged only in inaction with respect to those schools. Cole and Manual were firmly established and identified as the secondary schools in Denver for Negroes as early as 1947 when blacks were still in the minority (PX 336, A. 2084a). The decisions in 1956 insured that they would become *predominantly* Negro as well as have a *concentration* of Negroes. It can be no defense for the board's discriminatory action in 1956 that this process did not culminate in a majority Negro school for a number of years. It is enough that the likely effect of

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[28] See testimony of Mrs. Palicia Lewis, A. 691a-697a; testimony of Senator George Brown, A. 871a-876a; testimony of Mrs. Rachel Noel, A. 85a-88a. As we have described above in the text at p. 77 Mrs. Lewis found that moving out of the core city to an integrated area provided only temporary integration, since the board offered a choice of accepting mobile units at the integrated schools—which tended to segregate it—or accepting busing back to the core city. Senator Brown found that his move to a white area, followed by other blacks, was accompanied by a board decision removing the option of his children to attend a white school and including them in the mandatory area of Manual and Cole. Mrs. Rachel Noel found that living in the area where her child was bused to Anglo schools in Park Hill provided only temporary integration as Barrett School was constructed with the result her child was resegregated.

the board's discrimination would be to set such a process in motion and that there is no showing *by the board* that current segregation is not the product of its past discrimination. *Cf. Swann* v. *Board of Education*, 402 U.S. 1, 26 (1971).

Finally, of course, the position that a nonracial integrative step of adding Northeast Denver areas, which were then Anglo, to Manual in 1956 would have been futile, ignores the district court's other findings about what did occur in Park Hill. The very school areas which might have been added to Manual to integrate it are the same Northeast Denver areas—the corridor of black population movement to the east, served by such schools as Barrett, Stedman and Hallett. These are the very areas where other discriminatory action by the board occurred. We can only speculate about what pattern the black population movement in Northeast Denver would have taken if there had been no policy of racial containment and separation in the school system. But surely any uncertainty in this regard must be resolved against the discriminators. It is the board's burden to prove that its discriminatory action did not have the intended effect and cause the existing segregated situation. The district court's decision misplaced the burden of proof on the issue of the cause of segregation. It should have followed a rule similar to that in *Swann* v. *Board of Education*, 402 U.S. 1, 26 (1971), which places the burden on school boards dismantling dual systems to show that any schools that are substantially disproportionate in their racial composition are not the result of present or past discriminatory action on their part. A similar burden ought to be placed on a school board shown to have engaged in some covert segregating with respect to each and every act of discrimination.

Another pervasive error by the court of appeals is the fact that the court gives no weight to the fact that the

Denver system engaged in a policy of assigning minority teachers only to minority schools for many years, and continued up to the time of the lawsuit to concentrate minority teachers in schools with minority pupils. Faculty segregation is an obvious means by which the white and black schools were identified as such. Courts have used the fact of a pattern of racial discrimination in teacher assignment as a telling point in showing an identification of some schools as black schools. *Swann* v. *Board of Education*, 402 U.S. 1, 18 (1971); see, e.g., *Spangler* v. *Pasadena Board of Education*, 311 F. Supp. 501, 513-517 (C.D. Cal. 1970); *Davis* v. *School District of Pontiac*, 309 F. Supp. 734, 743-744 (E.D. Mich. 1970), *affirmed*, 433 F.2d 573 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971); *United States* v. *School District 151*, 301 F. Supp. 201, 228 (N.D. Ill. 1969), *aff'd*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971). The Tenth Circuit's excusing of faculty assignments by race, because it was based on "the prevailing educational theory of the day that Negro pupils related more thoroughly with Negro teachers,"[49] simply does not alter the fact that the practice served to racially identify the schools. The appeals court reasoning also ignores the trial court's finding that the faculty assignment policy was based on resistance of whites to minority teachers in white schools. 303 F. Supp. at 284-285.

C. Petitioners Proved a Prima Facie Case of Unlawful Racial Segregation, But the Courts Below Incorrectly Defined the Burden of Proving Constitutionally Actionable School Segregation.

As this Court recognized in *Swann* v. *Board of Education*, 402 U.S. 1, it is school officials who by their decisions about a variety of matters control the racial composition of the schools:

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[49] 445 F.2d at 1007.

> The construction of new schools and closing of old ones is one of the most important functions of local school authorities and one of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. *The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system.* Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. 402 U.S. at 20-21; emphasis added.

The record in the Denver case illustrates the general proposition recognized in *Swann* that the multiplicity of decisions made in planning and operating school systems have racial effects—and that those racial effects are generally predictable. The Denver record shows also that the board has achieved one uniform result by its actions; they have minimized integration and maximized the separation of black pupils from white pupils. We urge that this proved a prima facie case of unconstitutional segregation. It is entirely unworldly to suppose that a board which has been caught making a number of decisions which are explicable only as subterfuge for racial segregation (See Part I-A, *supra*) made all of its other decisions in a color-blind fashion. The fact is that the district court did not find more instances of discrimination simply because whenever there was more than one possible explanation for a decision, the

district court gave the board credit for the nonracial ones. But obviously the board was consistently discriminating; the difference from decision to decision is only that, as to some, they could get away with discriminating by reason of the availability of possible nonracial explanations. As complex as school system management is, a school board can almost always find a post-facto justification for its decisions on some rational basis. It is amazing that petitioners were able to establish a few cases of discrimination so blatant, and school management so distorted by racial considerations that the board could not present any convincing rational explanation. Plaintiffs will seldom, perhaps never, be able to make such a showing for every school in a system with a covert segregation policy.

We submit that at least in a case where the court has found some racially discriminatory factors and practices in a system, and there is a general pattern of racial separation consistent with discrimination, the burden must shift to the school authorities to explain the segregation not merely by the availability of some rational explanation, but by a compelling state interest, which could not be served by less segregatory practices.[39]

In many other types of race discrimination cases—such as, for example, jury discrimination cases—it is accepted doctrine that a certain type of showing of discriminatory results is sufficient to shift the burden to a defendant to establish some compelling state interest sufficiently substantial to negate the presumption of discrimination. Whatever may be the precise type of showing of such proof needed in a school case where there is no proof of intent, certainly in a case like Denver where the fact of segregatory

[39] See Dimond, *School Segregation in the North: There is but One Constitution*, 7 Harvard Civil Rights-Civil Liberties Law Review 1 (1972).

intent has been found, then the burden of proof ought to shift to the defendants to explain conduct having a discriminatory result consistent with the pattern of intentional discrimination already found.

The court of appeals' response to plaintiffs' argument was that it would be incongruous to require the school board to prove the non-existence of an illicit intent and that in southern school disestablishment cases there was merely a burden to show conversion to a unitary system. 445 F.2d at 1005. The court said that such an "onerous burden does not fall on school boards who have not been proved to have acted with segregatory intent." *Ibid.* In the first place, this ignores that Denver *was found to have had segregatory intent.* In the second place, it fails to focus on the burden which plaintiffs' prima facie case would place on the board which would be the burden of showing a compelling state interest justifying the segregatory result rather than a burden of proving some secret state of mind.

The board might attempt to satisfy the burden of rebutting a prima facie case by various showings including reference to its neighborhood school policy. But the neighborhood school policy is certainly not an automatic justification for segregation, considering the impact of school segregation on neighborhood segregation and other factors. *Swann* v. *Board of Education*, 402 U.S. 1 (1971).

School board decisions constantly define the neighborhood served by any school. The range of opportunities for control by various mechanisms has been demonstrated on this record and described in the Statement, *supra* at pp. 18, *et seq.* With such a broad range of controls and the readily availability of *post facto* explanations for segregation, a rule which focuses the test of constitutionally actionable

segregation on proving that conduct is a sham to hide illicit motives, will not go far to remedy the evil of covert school segregation. Such an approach fails to recognize that "patterns of racial discrimination are entrenched throughout this country," that "all school segregation is largely traceable to such racial discrimination," and that "dominant white majorities everywhere are hostile to association with blacks, especially in schools and residential neighborhoods." Dimond, *School Segregation in the North: There Is But One Constitution*, 7 Harvard Civil Rights-Civil Liberties Law Review 1, 4-5 (1972). The record in this case discloses that no compelling state interest was present to justify the pervasive pattern of segregation in Denver. There certainly was no showing of any justification for the complained of acts at Manual High School and Cole Junior High—the pivotal black schools in the core city area—and the district court found none. A conclusion that segregation was also actionable at Manual and Cole[91] ought inevitably to lead to system-wide relief because these important schools have a history of a feeder relationship with the all-black elementary schools in the core city area. Beyond these particulars the proof of a prima facie case of covert discrimination should place on the school board the same burden *Swann* places on a board which asserts it has dismantled a dual system. The board should bear the burden of justifying racially disproportionate schools. Denver school officials have the means

[91] It is of course true that segregation at Cole was found actionable by the district court because of the recission of the 1969 resolutions. The court of appeals affirms relief aimed at desegregating Cole even though it is not clear what its theory is since its opinion states the court does not reach the issue of whether the recission was unconstitutional. 445 F.2d 999, 1002. This points up the inconsistent results which are inevitable under a piecemeal approach to a system-wide problem. Also, finding segregation actionable at Cole and lawful at Manual produces an incongruous and anomalous result which ignores the historic relationship of these two schools.

readily available to desegregate every school in the system. This can be accomplished by the same type of control of the racial composition of schools which has brought about the present segregated system. The board made no showing to justify maintaining the segregated system created in Denver by racially discriminatory actions of public officials.

II.

Denver's Systematic Disparate and Discriminatory Educational Treatment of Minorities Violates Equal Protection and Entitles Petitioners to System-Wide Relief.

The record in this case discloses a continuous disregard of the known result of respondents' education policy and practices—the unequal provision of educational opportunity to Denver's minority children.

In Part II-A-1 of this Brief we submit that the evidence and the findings of the respondents' system-wide and continuously disparate treatment of minorities in the effectuation of educational policies and practices, resulting in what amounts to a segregated and unequal educational caste system for Negroes and Hispanos violates the Equal Protection Clause.

In Part II-A-2 of this Brief we assert that the trial court's conclusion of equal protection violation was clearly correct under the law. In reversing, we respectfully urge that the Tenth Circuit misconstrued the basis of the trial court's conclusions, and more importantly, erred in its perceptions of the standards of equal protection appropriate to this case. The result of these errors, we maintain, is to wrongly deny the equal protection of the laws to Denver's black and Hispano school children by condoning, in the name of "neighborhood schools" the continuous, unequal provision of public education to them.

In Part II-B of this Brief, we support the trial court's remedial aproach to these educational disparities as being well within the bounds of proper judicial discretion and equitably appropriate to eliminate the violation prospectively while attempting to cure the injury already inflicted.

In Part II-C of this Brief we contend that while the trial court's remedy was proper, it was improperly withheld from certain other predominantly minority schools equally afflicted with inequality, and urge that relief be extended to these schools.

A. Denver's Disparate, Unequal Treatment of Minorities in the Provision of Public Education Violates Equal Protection.

1. *The Evidence and Findings Below Demonstrate That in Denver Minority Children Were Consciously Treated Differently and Discriminatorily by Respondents' Policies and Practices When Compared to Anglo Children.*

The record is replete with a panoply of actions and decisions of the District wherein racial considerations resulted in the disparate educational treatment of minority children. To summarize:

The following educationally-relevant matters were wholly within the control of respondents:

(1) The initial assignment of minority teachers.—The minority schools always ended up with concentrations of minority teachers; in the face of announced contrary policy from 1964 on concentration in some minority schools actually increased.[11] Thus the assignment of Negro teachers to Anglo schools was treated differently than their assignment to Negro schools or the assignment of Anglo teachers to any

[11] See pp. 11-12; 19-20, *supra*.

school. The accelerated dispersal of minority teachers to Anglo schools coincided with the bringing of this lawsuit.[93]

(2) The initial assignment of teachers.—The administration was aware of the level of teacher inexperience in the minority schools; it purported to hire only teachers ready and willing to serve in the core city schools; of the teachers new to the Denver system, they asserted that a high proportion came with experience from other systems.[94] But respondents failed to show, although they had recourse to records which could have demonstrated, if true, that these teachers with prior experience were assigned to the minority schools.

(3) The transfer of teachers between schools.—While the administration had the power to initiate, approve or disapprove requests for transfer on the grounds that they were not in the best interests of the District, they never exercised this power to improve the quality of faculty in the minority schools.[96]

(4) Teacher turnover.—In 1966 the District abandoned the only policy then in existence which helped alleviate turnover in the minority schools—the policy that new teachers were expected to serve their 3-year probationary period in the school to which they were initially assigned.[96] The administration also abstained from any effort directed toward encouraging teachers to stay in the minority schools.[97] It was content to let nature take its course.

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[93] DX-DA, A. 2143a.
[94] Johnson, A. 331a-34a, 337a-38a. DX-DB, A. 2144a.
[95] PX 26; DX-E; Johnson, A. 322a-23a.
[96] PX 26; DX-E; Johnson, A. 320a-21a.
[97] Johnson, A. 320a-21a.

(5) Achievement expectancies.—The administration established low expectancies for the minority children at these schools and then both concealed and praised the expected poor results of this prophecy, while it established high expectancies for Anglo schools.[98]

(6) Performance and course content standards.—The administration at least condoned if not encouraged lower standards of performance and course content in the minority schools.[99]

(7) Career expectancy.—The administration acted upon and enforced an expectancy that minority children would not be going on to higher education, thus directing them into semi-skilled vocational education and out of college preparatory courses.[100]

(8) Location of schools, boundary changes.—While in selecting the site of schools exclusively for Anglos, the administration and the board were guided only by educational considerations, where race was a factor educational considerations were subordinated to political pressures and majority will. Similarly, boundary changes were influenced by racial and political considerations rather than the consistent application of such neutral criteria as building capacity, distance, availability of transportation, growth projections, etc. When faced with choices between integration and segregation, the board, knowing in advance what the result would be, "searched" for the consensus and then followed

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[98] See pp. 49-53, *supra*.

[99] See PX 356, A. 2086a; Oberholtzer, A. 1406a-07a.

[100] PX 356, A. 2086a.

it.[101] That public hearings were not intended to develop operative facts is demonstrated by Mr. Traylor's testimony about the board's intransigence about the facts of the administration's Manual and Cole boundary change proposals in 1956.[102]

(9) Transportation of students and deployment of mobile units.—When Anglos were brought into the District by annexation, the District did not take the nearest existing school and add mobile units to it to accommodate these children, but rather, transported them clear across town to other Anglo schools with available space, often directly past minority schools with available space. However, where minority enrollment increased within the attendance area of an existing minority school, these minority children were not accommodated by being transported to these Anglo schools where space was available, but rather, were consistently confined in mobile units at the nearest existing minority school.[103] When new Anglo schools were opened creating spaces in the former Anglo receiving schools, minority students were kept in these mobile units rather than being transported to the Anglo receiving schools—all of these events occurred after February, 1966[104] when the board officially endorsed transportation to relieve overcrowding.[105]

(10) Transporting students.—When Anglos were transported to receiving schools, either to relieve over-

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[101] 313 F. Supp. at 73. See pp. 16; 31-32, *supra;* Mrs. Johnson, A. 928a-29a; A. 932a-33a.

[102] See pp. 29-31, *supra.*

[103] See pp. 24-27, *supra.*

[104] Johnson, A. 361a; PX 29; Johnson, A. 362a-66a.

[105] Bardwell, A. 770a-71a, A. 773a-75a; PX 390-B.

crowding or to furnish new students with a school, each receiving school was filled to rated capacity or more before the next was utilized. In the few instances when minority students were transported they were brought into each Anglo receiving school in very small numbers, completely unrelated and disproportionate to the number of openings at the Anglo school.[106]

(11) The "Neighborhood School Policy."—Before the minorities began their expansion out of the core city there were so many attendance options available to students through optional zones and permissive transfer policies as to cast doubt as to whether there was a policy of "neighborhood schools." Optional zones were not considered by the administration as controlling devices for capacity utilization, but rather, as a politic acquiescence in parental choice.[107] Yet these zones persisted, particularly in transition areas such as between Cole and Smiley, Manual and East, until finally publicly denounced by the Voorhees Report. But they were immediately replaced in 1964 by LOE which accommodated white flight just as expeditiously.[108] When VOE was finally implemented in January, 1969, LOE was not cancelled; students enrolled in the LOE program were allowed to continue, and some are still continuing today.[109]

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[106] Bardwell, A. 769a-76a; PX 390, 390-A, 390-B.

[107] See pp. 31-32, *supra;* A. 1422a-23a.

[108] See pp. 32-33, *supra.*

[109] Thus a hypothetical Anglo child living in the Smith Elementary district in 1968 could have transferred to all-white Fallis and gone into and remained in that predominately Anglo system of feeder schools, Fallis, Place Junior High and George Washington High.

(12) School capacity.—The administration applied different capacity criteria, depending upon whether the school was predominately Anglo or predominately minority. Under this policy, Anglo schools were not considered overcapacity until their enrollments exceeded 120% of rated capacity, whereas minority schools were considered fully utilized when at less than 80% capacity.[110] It was this double standard which the administration used to justify busing Anglos past minority schools which were under their rated capacity.[111] The double standard also was employed in the administration's rejection of using available space in minority schools to relieve adjacent overcrowded Anglo schools.[112] The capstone of its employment was the building of Anglo schools in new areas while ignoring space in existing minority schools, thus further entrenching segregation in both schools and neighborhoods.[113]

(13) "Long range" and "short range" planning.—The administration inconsistently applied planning criteria when race was a consideration. The respondents' defense of their decisions regarding the 1956 boundary changes at Cole and Manual are entirely inconsistent with the criteria they employed to justify the size and attendance boundaries of Barrett.

Mrs. Lois Johnson[114] stated that in 1955 adminis-

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[110] Oberholtzer, A. 1409a-10a; see pp. 24-26, *supra*.

[111] PX 390, 390-A, 390-B; Bardwell, A. 765a; Armstrong, A. 1263a-70a.

[112] See pp. 26-27, *supra*.

[113] PX 273, 346, 347; Bardwell, A. 757a-65a.

[114] It may be recalled that Mrs. Johnson served on the board from 1951 through 1963; in 1962 and 1963 she was the President of the Board. A. 896a.

tration projections were that Manual and Cole, both then substantially under capacity, would not reach their capacity until 1960. In contrast, the projections showed that both East and Smiley, then already at capacity, would be at nearly 170% of capacity by 1960. According to Mrs. Johnson the District was strapped for funds and "[W]e were in a very difficult situation to have enough classrooms for all the incoming children." A. 900a. Nevertheless, in refusing to move the Cole and Manual boundaries to accommodate the expected overcrowding at Smiley and East the board consciously refused to utilize the space available at Cole and Manual, *rejecting* the alternative as being too short term.

Yet, when Barrett was being considered the population was also growing just east, across Colorado Boulevard. Rather than reflect the long-term projections by making Barrett large enough to accommodate the increase, the board here *embraced* a short-term solution,[115] consciously building for only the immediate needs of the small Barrett "neighborhood," and refusing to accommodate Anglos overcrowded in adjacent Stedman.

In these two instances, both occurring in a span of but two years, the board was willing to use totally inconsistent criteria. Only the *result* is consistent: the avoidance of sending Anglo children to Negro schools. As Mrs. Johnson put it: "We were not building with integration as our idea, of course." A. 937a.

(14) Adherence to "Neighborhood Schools."—The respondents maintain that throughout the twenty-two year period preceding this suit, they were simply

[115] Mrs. Johnson, A. 912a.

administering a neutral "color blind" policy of neighborhood schools. We will ignore arguendo the doubt which the combination of the thirteen factors discussed above must cast on that contention.

Taking the assertion at face value, the school administration, with the political complicity of the board, has continued to insist upon neighborhood schools imposed upon segregated housing patterns, even though it was consciously aware of

—the racial results in the schools created by the policy;[116]

—the inferiority of these schools, whether measured by inputs or results;[117]

—the increase in the number of inferior schools and in the number of minority children exposed to and confined in them;[118]

—the failure of segregated compensatory programs to improve the schools.[119]

While acknowledging that historically public education in Denver and throughout the United States has taken (white) children from low socioeconomic areas, whose parents were disadvantaged and managed to provide them with an education, the respondents point to these same factors as imposing a nearly absolute barrier to the education of Negroes and Hispanos. It is clear that the school administration's perceptions of and attitudes toward Negroes and Hispanos is different than toward Anglos. This point was made perfectly in the following exchange between Mr. Ris and Dr. Dodson during cross-examination:

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[116] See pp. 47-50, *supra*.

[117] See pp. 40-44; 48-50, *supra*.

[118] Oberholtzer, A. 1393a-94a, A. 1402a-04a.

[119] See pp. 61-62, *supra*.

Q. Now, with regard to the handicap, a child coming from a family in a neighborhood and a lower socioeconomic status, you wouldn't deny that those children are handicapped as compared to me, would you, before they ever get into [2221] school? A. I would deny that the experience that they have brought with them, the experience through which they have come by the time they are of school age, has so impaired their sensory mechanisms that they do not have the capacity to acquire and organize, experience in ways comparable to what you or I might have done at a comparable stage of our lives. I would be planting corn in East Texas today if teachers had seen the low socioeconomic status kid and the limitations of him and his inability to learn because he didn't have all these things and had believed them.

Q. You aren't alone in the courtroom in that regard. . . . A. 1498a.

The district's control and implementation of the policies enumerated above always achieved some result which discriminated against Denver's minority students; the major results were that these children were assigned to and then confined in racially identifiable, isolated, inferior schools; educationally relevant matters such as teacher assignments, location of new schools and boundary changes were saddled with educationally irrelevant considerations such as the will of the majority community and its racial prejudices; the perception of the minority student as somehow different, and the establishment of lower standards and expectations for him created an educational caste system.

Even standing alone this discriminatory, conscious difference in respondent's policies, practices, attitudes and perceptions relating to the education of minority children

for over twenty years constitutes a clear denial of equal protection based upon race and ethnicity, for it is exactly the type of invidious, disadvantaging discrimination at which the Fourteenth Amendment was directed. This distinctive and disparate racial treatment would violate equal protection even if the minorities were somehow able to overcome these obstacles and obtain educational results equal to Anglos: the creation of obstacles in and of itself denies equal protection.

But where as here the evidence and the trial court's findings demonstrate that these obstacles in fact adversely affect the quality of education of minority children as measured by the educational result—low achievement and high dropout rates—the denial of equal protection is manifest.

Not only did the racially-disparate treatment of the matters enumerated above create obstacles for minority students which were not imposed upon Anglos seeking effective education, but these obstacles actually resulted in the denial of an equal educational opportunity by the creation and perpetuation of inferior schools for Negroes and Hispanos.

At the trial the inferiority of these schools was established by every conceivable means, some of which have already been alluded to above: traditional tangible educational inputs such as teacher experience and stability of teaching staff; administration-established expectancies as to the level of achievement and administration acceptance and condonation of the resulting low achievement; the age of school facilities.[130]

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[130] Evidence of the inequality of a less traditional input, a socio-economically heterogeneous peer group in the school, was also considered and found to be inferior in these schools.

The inferiority extended to such intangible factors as the attitudes of the entire community, as well as of the minority community and the teachers and students in the schools, attitudes created by the segregated, racially identifiable character of the schools. The school's racial isolation also created feelings of low self esteem, political impotence, isolation and inferiority, both in the minority children and their parents.

Finally, the inferiority was reflected in the ultimate educational product of the Denver Public Schools, the minorities' drastically low level of academic achievement and cruelly high level of dropouts.

The expert testimony concluded that the above factors demonstrated that these schools were affording an unequal educational opportunity to minority children, and that the primary reason for the inequality was the segregated, racially-isolated and racially identifiable condition of the school.[121] It was the segregated condition of the school which made it a place of "less choice" for parents, students and teachers, and "a symbol" of inferiority and impotency for the minority community. It was looked upon by the whole community as being inferior, and "this makes it indeed so." [122]

Thus, petitioners' evidence of *violation* of the Equal Protection Clause was directed toward the factual establishment of three matters:

(1) The fact that an inequality existed between the educational opportunities[123] offered to Denver's mi-

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[121] See pp. 33-37, *supra*.

[122] Dodson, A. 1478a.

[123] Petitioners have never claimed nor did the district court's decision in any way rest upon some notion that educational opportunity was solely related to, or demonstrated by, an equivalent performance by every student. Obviously students will have, on an

nority students when contrasted with that offered to majority students;

(2) The fact that the respondents' actions were the responsible cause of the inequality;

(3) The fact that less discriminatory means were reasonably available to respondents in their provision of educational opportunity, a matter not really contested by respondents, whose position was that since their current system was *not* discriminatory, they should not be required to change it.

The trial court's findings of fact sustained the petitioners' contentions on both of these contested issues.[114]

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individual basis, different aptitudes and will perform, ideally, to the full extent of their varying capabilities. What is significant about the tangible measure of output here, such as achievement test scores, is two things. *First*, they establish a consistent and systematic differential between white schools and minority schools of such magnitude as to vitiate any suggestions that the observed pattern is merely the result of the interplay of different individual capacities. *Cf. Stell* v. *Savannah-Chatham Board of Education*, 318 F.2d 425 (5th Cir. 1963), 333 F.2d 55 (5th Cir. 1964). *Second*, they confirm the testimony of petitioners' expert witnesses that such segregated schools characteristically produce educationally undesirable effects upon the children and the teachers and can be expected to adversely affect the educational opportunity afforded the students.

[114] As to the fact of inequality:

OBJECTIVE FACTORS:

"Extensive and detailed evidence has been presented establishing the inferiority of plaintiffs' target schools." 313 F. Supp. at 77.

"The above material summarizes plaintiffs' evidence and our findings as to the objective indicia of inequality at the schools for which they seek relief." 313 F. Supp. at 81.

SUBJECTIVE FACTORS:

". . . [B]y the time a school becomes segregated it is looked upon by the whole community as being inferior.

"At this point the Negro community does not consider the segregated school as a legitimate institution for social and economic advancement. Since the students do not feel that the

2. *The Trial Court's Determination of Violation Resulted From the Proper Application of Equal Protection Principles.*

In its determination of violation the trial court applied traditional equal protection analysis. It recognized, as did *Brown*,[135] that education is a fundamental interest, the deprivation or impingement of which must be closely scrutinized. Further the trial court reasoned that where

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school is an effective aid in achieving their goal—acceptance and integration into the mainstream of American life—they are not motivated to learn. Furthermore, since the parents of these Negro students have similar feelings with respect to the segregated school, they do not attempt to motivate their children to learn. Teachers assigned to these schools are generally dissatisfied and try to escape as soon as possible. Furthermore, teachers expect low achievement from students at segregated schools, and thus do little to stimulate higher performance." 313 F. Supp. at 81.

Finally:

"The evidence in the case at bar establishes, and we do find and conclude, that an equal educational opportunity is not being provided at the subject segregated schools within the district. . . . The evidence establishes this beyond doubt." 313 F. Supp. at 83.

As to the cause of the inequality:

". . . [W]e cannot ignore the overwhelming evidence to the effect that isolation or segregation per se is a substantial factor in producing unequal educational opportunity." 313 F. Supp. at 81.

As to the respondents' responsibility:

"Many factors contribute to the inferior status of these schools, but the predominate one appears to be the enforced isolation imposed in the name of neighborhood schools and housing patterns." 313 F. Supp. at 83.

[135] "We must consider public education in the light of its full development and its present place in American life throughout the nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."

"In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. 492, 493.

the impact of the deprivation fell upon the poor, and ethnic and racial minorities, a suspect classification was involved which also had traditionally triggered close judicial review and required strong justification by the State for its actions.[126]

The only justifications put forth by the respondents was their good faith (which the trial court held irrelevant in the face of the proven discriminatory result),[127] the convenience and tradition[128] of the neighborhood school policy and the majority community's preference for the continuation of that policy.[129]

The trial court apparently found in these proffered justifications no compelling state interest sufficient to excuse or justify the discriminatory result, and concluded that the petitioners were being denied equal protection of the laws in violation of the Fourteenth Amendment. 313 F. Supp. at 83.

We submit that the trial court was correct in concluding that this systematic deprivation of the minority's right to equality of educational opportunity violated the Equal Protection Clause.

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[126] Citing *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963); *Hobson* v. *Hansen*, 269 F. Supp. 401, 497 (D. D.C. 1967).

[127] 313 F. Supp. at 82, n. 25.

[128] In view of the numerous optional attendance zones surrounding Denver's schools until 1964, and the absence of requirements for student transfers which existed for many years (Biddick, A. 697a-99a), one could question whether there was a tradition of "neighborhood schools."

[129] A preference which persisted despite the findings of the two study committees that its continuation might result in the inequality of educational opportunity for the District's minority children. PX 20, A. 1999a-2004a; PX 21, p. 36.

The whole basis of the Fourteenth Amendment historically was to prevent the systematic disadvantaging of minorities. Thus the first Fourteenth Amendment cases to reach this Court held all racial classifications unconstitutional: *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873); *Strauder* v. *West Virginia*, 100 U.S. 303 (1880).[139]

While the separate-but-equal doctrine diluted the main thrust of equal protection, it was premised upon failure to find inequality in the fact of separateness.

Subsequent decisions here relating to separate-but-equal education began an independent analysis to determine if there was inequality. *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950).

This inquiry culminated in *Brown*, which found that racial classifications in public education inherently produced unequal educational opportunity.

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[139] *Strauder* v. *West Virginia*, considered a Negro's plea of denial of equal protection. Strauder had been convicted of murder by a state court jury in West Virginia. West Virginia law disqualified Negroes from service on either grand or petit juries. This Court declared that the Fourteenth Amendment should be "construed liberally to carry out the purpose of its framers." 100 U.S. at 307. The court continued:

> "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." 100 U.S. at 307-08.

More recently, the Court has sharpened its perception of illegal discrimination under the Equal Protection Clause in ways clearly applicable to the facts of this case.

It can be argued that the neighborhood school policy is neutral and nondiscriminatory because it is applicable to Anglos and minorities alike. But this line of contention has been rejected in various contexts where racial classifications were defended as non-discriminatory because they applied to both blacks and whites. *Cf. McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

As demonstrated above, when race was a factor the respondents consistently acted differently than when race was not an issue. This disparate racial treatment in itself required the showing of a compelling, nonracial reason for its discriminatory, segregatory result.

It is also clear from the evidence described above that this disparate treatment in the administration of an apparently neutral policy resulted in the systematic imposition of burdens upon Negroes and Hispanos but not upon Anglos. Thus it was the Negroes and Hispanos who were required to attend these unequal schools. "Class legislation, discriminating against some, and favoring others is prohibited . . ." *Yick Wo* v. *Hopkins*, 118 U.S. 356 at 368 (1886), quoting *Barbier* v. *Connolly*, 113 U.S. 27 (1885).

Even before *Brown* this provision of an unequal opportunity for public education to minorities would violate the Fourteenth Amendment under *Plessy*.[131] As noted in *Brown*,

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[131] *Sweatt* v. *Painter; McLaurin* v. *Oklahoma State Regents, supra.* Tangible inequalities in the provision of lower public education were consistently struck down. *Corbin* v. *County School*

> Such an opportunity [for education] where the state has undertaken to provide it, is a right which must be made available to all on equal terms. 347 U.S. 493.

Thus the Equal Protection Clause is violated simply by the District's actions which systematically made it more difficult for minority children to receive an education where such difficulties were not imposed upon Anglo children. This result would obtain even if the minority student somehow managed to overcome the burdens. As noted in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), where the state action "places special burdens on racial minorities . . . ," it is "no more permissible than denying them the vote, on an equal basis with others. . . ." 393 U.S. at 391-92. In *Hunter*, the Court in determining whether there was a racial classification looked behind the apparently equal application of the law to everyone and found the "reality" to be "that the law's impact falls on the minority." 393 U.S. at 391.

Hunter is another of a line of equal protection cases where the Court has struck down state action which merely impinged upon a right without requiring a showing that the right was actually denied. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Dunn* v. *Blumstein*, —— U.S. ——, 40 U.S.L.W. 4269 (Mar. 21, 1972); *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966).

It of course follows where as here the board's actions had an actual adverse impact upon the educational result for minority children unable to overcome the obstacles and burdens which were created by the board, there has been a clear denial of equal protection. This is the teaching of an unbroken line of decisions invalidating actions which

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Board, 177 F.2d 924 (4th Cir. 1949); *Carter* v. *School Board of Arlington County, Virginia*, 182 F.2d 531 (4th Cir. 1950).

denied equal rights to minorities in the use of public facilities, in voting, jury selection, and numerous other areas.[122]

Similarly, where the action denied or impinged upon a fundamental interest such as procreation and marriage,[123] voting,[124] or access to the criminal appellate procedure,[125] even where there was no racial classification involved this Court has required the State to come forward with compelling reasons for its denial of the right. *Harper* v. *Virginia State Board of Education*, 383 U.S. 663, 670 (1966):

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which *might* invade or restrain them must be closely scrutinized and carefully confined. . . . (Emphasis added.)

It seems apparent that the right to an equal opportunity for public education is such a fundamental interest.

The trial court was correct in concluding that the respondents' systematic denial to Negroes and Hispanos of the fundamental right to an equal opportunity for public education, a denial unjustified by the absence of less discriminatory alternatives and unexcused by the presence of a compelling state interest violated the Equal Protection Clause of the Fourteenth Amendment.

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[122] *Muir* v. *Louisville Park Theatrical Association*, 347 U.S. 971 (1954); *Mayor and City Council* v. *Dawson*, 350 U.S. 877 (1955); *Gayle* v. *Browder*, 353 U.S. 903 (1956); *Johnson* v. *Virginia*, 373 U.S. 903 (1963); *Lee* v. *Washington*, 390 U.S. 333 (1968) *(per curiam)*; *Norris* v. *Alabama*, 332 U.S. 463 (1946); *Turner* v. *Fouche*, 396 U.S. 346 (1970).

[123] *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

[124] *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Kramer* v. *Union Free School District*, 395 U.S. 699 (1969).

[125] *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963).

The Court of Appeals in reversing held that "racially imbalanced schools . . . established and maintained on racially-neutral criteria . . ." did not deny equal protection. 445 F.2d at 10005. It reached this result[126] while apparently accepting the premise that unequal educational opportunity would violate equal protection, "provided the state has acted to cause the harm. . . ." 445 F.2d 1004.

The opinion reveals no open disagreement with the trial court's findings of fact that an unequal educational opportunity was being provided to minority children. As to the cause of the inequality some disagreement is apparent, but it is not supported by any appellate determination of clear error, but rather conveniently ignored or mischaracterized as a legal conclusion based upon a *per se* concept of inherent inequality stemming from any kind of segregation.[127] Overall, however, while there is no clear reversal of findings there is reflected in this section of the opinion the same piecemeal, fragmenting approach to the record which we have commented upon elsewhere in this Brief.[128]

We summarize the appellate court's treatment of the facts in the footnote below.[129] The court of appeals treat-

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[126] We are unable to state with confidence exactly how this result obtained, but we will nevertheless attempt to demonstrate that regardless of the process employed by the appellate court, the result is unsupportable.

[127] See p. 113, *infra*.

[128] See pp. 73-79; 91, n. 9, *supra*, 115-116, *infra*.

[129] The court agreed that the evidence sustained the finding of comparatively low teacher experience in the minority schools, but gave it no legal effect, 445 F.2d at 1004. High teacher turnover and its relationship to the district's transfer policy was not discussed by the appellate court. It agreed with the findings of low academic achievement and high dropout rates, but apparently interpreted these as being "indicative of a flaw in the system" rather than evidence of unequal opportunity. 445 F.2d at 1004. Smaller sites and older buildings were not discussed. As far as the intangible factors in the segregated school, the court stated that it could not dispute

ment tended to mix the separate issues of the fact of inequality and its cause, treating them as one issue.[140]

As to the issue of the causation of the inequality the appellate court rejected the trial court's finding that it was the segregated condition of these schools which was a major and predominant factor in producing inferior schools and unequal educational opportunity.

Either of the two possible explanations for this result indicate its error.

The first explanation is that the appellate court rejected the trial court's findings of fact as to causation and substituted its own judgment as to causation.[141] The trial court's findings were supported by substantial evidence and

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"the welter of evidence offered in the instant case and recited in the opinion of other cases that segregation in fact may create an inferior educational atmosphere." 445 F.2d 1004. Nevertheless the court gave no weight to the fact of this inferior educational atmosphere. 445 F.2d at 1004-05.

[140] See 445 F.2d at 1004-05.

[141] The appellate court stated:

> "Thus it is not the proffered objective indicia of inferiority which *causes* the substandard academic performance of these children, but a curriculum which is allegedly not tailored to their educational and social needs." 445 F.2d 1004. (emphasis ours).

Of course, as the trial court properly understood, the "objective indicia of inferiority" were not presented to nor used by the trial court as evidence of causation, but rather as evidence that these schools were in fact inferior. Some of these indicia did contribute to the inferiority but they were not asserted as being its principal cause. As the trial court summed it up:

> The above material summarizes plaintiffs' *evidence* and our findings as to the objective indicia *of inequality at the schools* for which they seek relief. Although plaintiffs claim that factors such as inexperienced faculty tend to contribute to the inferior educational opportunity provided at these schools, their main argument is that the segregation which exists at many of these schools makes a *major contribution to their inferiority*." 313 F. Supp. at 81. (Emphasis added.)

their rejection violated the "clearly erroneous" rule of appellate review prescribed in Rule 52 of the Federal Rules of Civil Procedure.

The second explanation is that the appellate court either misunderstood or mischaracterized the trial judges factual finding of causation as though it were a legal conclusion. Thus the appellate court apparently believed that Judge Doyle had held that as a matter of law all segregated schools were inferior, regardless of how they became segregated.

The trial court specifically rejected this *per se* approach:

> "... [P]laintiffs are not entitled to relief merely upon proof that de facto segregation exists at certain schools within the School District." 313 F. Supp at 77.

It is therefore apparent that the Tenth Circuit's perception of the basis of the trial court's findings as to causation was erroneous. The trial court did not invoke a *per se* rule; indeed it expressly recognized that the Tenth Circuit's prior decisions in *Downs*[142] and *Dowell*[143] prevented such an approach. 313 F. Supp. at 76-77. Rather it seems clear that Judge Doyle's findings of inequality and causation were based entirely upon the evidentiary record before him.

Regardless of the correctness of these contentions as to the appellate court's treatment of causation, the decision reflects two pervasive errors for which the reinstatement of the trial court's decree is the only appropriate solution.

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[142] *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

[143] *Board of Education* v. *Dowell*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 913 (1967).

The first prevasive error is the appellate court's narrow perception of the application of the Equal Protection Clause to public education. The gravamen of the appellate court's result is that the Fourteenth Amendment is limited to the peculiar facts of *Brown*, and a misreading of *Brown* as requiring an intent to provide unequal opportunity to minorities.

The rationale of *Brown* is not based upon any concept or finding that in creating dual school systems the states' intended purpose was to disadvantage Negroes. Rather, *Brown's* finding is that the states intended to accomplish segregation and must therefore be held responsible for inequalities caused by the segregation. Similarly in the instant case there is no requirement that petitioners demonstrate that the respondents' purpose or motive was to disadvantage minorities but merely that the effect or result of their intended actions was discriminatory as to Negroes and Hispanos.

The denial of equal protection condemned by the Fourteenth Amendment requires only that the discrimination be the result of intended state action. Of course, where odious intent is shown as where it is clear that the only purpose was to discriminate, equal protection is also denied. But it is clearly error to reason that all violations must therefore be intentional in that sense. Rather, as shown by the authorities discussed above[144] the central theme of equal protection is that where state action results in a racial discrimination, the Fourteenth Amendment is violated unless the state can show a compelling nonracial reason for continuance of the discrimination. This proposition was well stated in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 706 (1961):

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[144] *Supra*, pp. 105-110.

> But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them *whatever the motive may be.* It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. *Id.* at 725 (emphasis added).

The appellate court's restrictive interpretation of equal protection was clearly wrong, and at the heart of the appellate court's reversal.

The second pervasive error arises from the appellate court's complete disregard of the multiplicity of decisions and policies by the board and the school administration which created, contributed to, condoned and continued the educational disadvantagement of Negroes and Hispanos. These practices and policies, and their discriminatory effect have been recounted elsewhere in this Brief and will not be again repeated here. In failing to give effect to the entirety of the District's actions, but rather taking a piecemeal view of the record, the appellate court arrives at the rather startling conclusion that the inequality is completely divorced from any state action:

> As stated in the first instance then the trial court's findings stand or fall on the power of federal courts to resolve educational difficulties *arising from circumstances outside the ambit of state action.* 445 F.2d at 1004 (emphasis added).

Finally, the appellate court also failed to give any weight to at least two factors each of which this Court has determined to constitute denials of equal protection. As to intangible factors contributing to inequality, the court not only ignored *Brown*, but *Sweatt* and *McLaurin* as well, all decisions finding denial of equal protection in the pres-

ence of intangible factors which disadvantaged the minority's right to equal educational opportunity.

Secondly, the board's unequal provision to minorities of such an important educational input as the quality, experience and stability of teachers clearly violates every concept of equal protection from *Plessy* to *Swann*.[145]

We submit that it must be apparent from an overview of the numerous ways which the board and administration controlled school location, size and boundaries, pupil assignment and educational inputs that the respondents were responsible for the inequality of educational opportunity and the inferiority of the minority schools which resulted from their policies. We have contended elsewhere in this Brief that many of these acts and policies were demonstrative of segregatory intent. But regardless of that contention, that these policies led to inequality and inferiority satisfies in full the state action requirement of the Fourteenth Amendment. The appellate court's inability to locate state action was a substantial, if not sole, basis for its conclusion that there was no denial of equal protection. We submit that the appellate court erred.

B. The Remedy Formulated by the District Court for the Provision of Equal Educational Opportunity Was Fully Supported by the Record and Within the Bounds of Proper Judicial Discretion.

The breadth and flexibility inherent in equitable remedies was well stated in *Hecht Co.* v. *Bowles*:[146]

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flex-

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[145] See 402 U.S. at 18-19.

[146] 321 U.S. 321 (1944).

> ibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconcilation between the public interest and private needs as well as between competing private claims. 321 U.S. at 329-30.

In school cases arising under the Equal Protection Clause the principles of *Hecht* have often been endorsed by this Court, from *Brown II*[147] to *Swann*.[148] As noted in *Brown II*, in the exercise of this equitable power the district courts might have to eliminate "a variety of obstacles . . . in a systematic and effective manner." 349 U.S. at 300.

Brown had found that racial segregation inherently caused unequal educational opportunity for Negroes, and remedial efforts under *Brown* have been directed toward eliminating all vestiges of the dual system "root and branch." *Green* v. *County School Board*, 391 U.S. 430, 438 (1968).

In the instant case the remedial objective was perceived to be somewhat different than under *Brown* and its progeny. The violation found was not cast in terms of racial segregation but rather as the State's unequal provision of public education to Denver's minority children. Thus the remedial objective went beyond the elimination of segregation and included the equalizing of minorities' educational opportunities.

Certainly the principles established since *Brown* are relevant to this case, for here too the racial identity of schools was found to be an important contributing factor to the inequality.

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[147] *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955).

[148] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971).

These principles include:

1. The remedy must promise "realistically to work." [149]

2. The remedy must be thorough in its elimination of the violation and in guarding against its reoccurrence; it must be eliminated "root and branch." [150]

3. The remedy must treat all vestiges of the violation; pupil assignment, faculty and staff assignment, transportation, extracurricular activities, or any other factor contributing to the racial identity of the school; Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, "a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." *Swann, supra,* 402 U.S. at 18.

   Tangible inequalities and different treatment on the basis of race must be eliminated. *Ibid.*

4. "The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation . . ." *Swann, supra,* 402 U.S. at 26.

5. "It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress. . . . It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. . . . Of course the availability to the board

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[149] *Green* v. *County School Board,* 391 U.S. at 439.

[150] *Id.* at 438.

of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preferences for an apparently less effective method." *Green supra*, 391 U.S. at 439.

6. The constitutional principles of equality "cannot be allowed to yield simply because of disagreement with them," [151] nor are the minority's constitutional rights "to be sacrificed or yielded to . . . violence and disorder . . . ," [152] nor can they be nullified "ingeniously or ingenuously." [153]

Just as the foregoing principles apply to the objective of the elimination of segregation, they are equally applicable to the objective of equalizing educational opportunity.

The trial court properly applied these principles in formulating a varied remedy. The board's proposals were limited to segregated compensatory education programs and the Denver version of freedom of choice.

Judge Doyle properly rejected compensatory education in a segregated setting where the record demonstrated the ineffectiveness of such programs.

In accepting compensatory education in an integrated setting the trial court selected a feasible, "more promising" program.

In rejecting the board's freedom of choice program as the exclusive means for ending the racial identity of

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[151] *Brown II, supra*, 349 U.S. at 300.

[152] *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958).

[153] *Id.* at 17.

schools, the trial court's judgment as to the inadequacy of this approach was indirectly endorsed on appeal. The appellate court stated:

> . . . [A] realistic appraisal of voluntary transfer plans has shown that they simply do not fulfill the constitutional mandate of dismantling segregated schools. In fact the voluntary transfer plans previously employed in Denver have had a minimal effect on the segregated status of the Park Hill area schools. 445 F.2d at 1002.

In mandating desegregation and integration, Judge Doyle implemented several important principles. The first was to remove the racial identity of the inferior schools. The second principle was that of timing; the mandatory plan would accomplish the objective much faster than a voluntary plan. Thirdly, desegregation and integration removed some of the principal causes of tangible inequalities in terms of teacher experience, teacher turnover, teacher expectancies and adequate facilities, as demonstrated by the Berkeley experience described by Dr. Sullivan. Finally, the trial court was recognizing not only that integration by itself assisted in raising minority achievements, but further that it furnished the best possible environment for compensatory education. The board's proposals ignored all of these factors, and were properly rejected by the court.

Finally, that the proposal to leave these schools segregated would have majority community support would not excuse failure to select an effective plan for the provision of equal opportunity.

The foregoing facts demonstrate that the board has defaulted in its duty to come forward with a realistic, effective plan. The trial court properly exercised its responsibilities in going forward and devising a remedy which on

the basis of the record before it offered superior potential for success.[154]

The trial court selected a variety of components, including desegregation, programs directed toward improving understanding of minority culture and history, raising teacher expectancies, raising the level of teacher experience, transportation, magnet schools, voluntary transfer and community education. The remedy exemplifies the equitable principles of fairness, flexibility and the balancing of interests. The remedy was fully within the administrative and financial competence of the District.

C. The Remedy Should Have Been Extended to All of the District's Predominantly Minority, Inferior Schools.

While as demonstrated above the trial court's formulation of the remedial plan was proper, we urge here that Judge Doyle should have extended the remedy to certain other schools in the District.

Eight elementary and one junior high school are involved in this contention.[155] As of September, 1969, these schools contained nearly 4,000 minority students and 860 Anglos, distributed as follows:[156]

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[154] *Swann, supra,* at 16:

"In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system."

[155] Boulevard, Crofton, Ebert, Garden Place, Gilpin, Swansea, Wyatt and Wyman; Morey Junior High.

[156] DX S-1, A. 2166a.

Racial Composition of Subject Schools

	Anglo		*Negro*		*Hispano*	
	No.	*%*	*No.*	*%*	*No.*	*%*
Boulevard	118	29.9	2	0.5	269	68.1
Crofton	23	7.1	121	38.4	162	51.5
Ebert	35	10.6	115	34.6	174	52.4
Garden Place	138	17.0	140	17.2	525	64.7
Gilpin	22	3.2	252	36.4	411	59.4
Swansea	197	29.2	24	3.6	450	66.6
Wyatt	9	1.9	223	46.4	248	51.5
Wyman	103	27.5	142	38.0	111	29.7
Total	645		1,019		2,350	
Morey Jr. High	215	26.8	419	52.4	149	18.6
Total	860		1,438		2,499	

The eight elementary schools contain 12% of the Negro and 18% of the Hispano elementary population. Morey contains over 13% of the Negro junior high population.[157]

[157] These schools contain less than 2% of the Anglo population. DX S-1, A. 2166a.

All of the tangible inequalities found in the court-designated schools are present to the same degree in these nine schools. Indeed, some of them are even worse than the average of the schools selected for relief.[118] On the average in 1968 the two groups of schools were nearly identical in their inequality:

	New Teachers	*Probationary Teachers*	*Median Yrs. Teachers Experience*	*Achievement 5th Grade Percentile 1968*
Subject Schools	20%	42%	3.7 yrs.	20th
Court Schools	23%	48%	3.5 yrs.	21st
District Average	15.9%	37%	5.6 yrs.	43rd
Selected Anglo Schs.	9.8%	25.6%	9.1 yrs.	75th

The evidence showed that the same low expectancies were established for these schools.[119] The expert testimony

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[118] Comparison of the Subject Schools to the Average Court-Designated School*

	Teacher Data			*Median Achievement 1968, Percentile Grade 5*
School	*New Ct. Avg. (23%)*	*Probationary Ct. Avg. (48%)*	*Median Experience Ct. Avg. 3.5 Yrs.*	*Ct. Avg. 21st Percentile*
Boulevard	17%	50%	3.0	20
Crofton	21	43	4.0	18
Ebert	21	42	3.0	18
Garden Place	18	37	4.0	16
Gilpin	25	42	4.5	23
Swansea	18	36	3.5	22
Wyatt	14	27	6.0	15
Wyman	22	50	4.0	24
	Avg. 20	Avg. 42	Avg. 3.7	Avg. 20

* PX 509, 510; A. 2122a, A. 2124a.

[119] PX 83.

was that the homogeneous peer group effect[159] and the adverse psychological attitudes[161] were the same in predominantly minority schools as in schools which were either predominantly Negro or predominantly Hispano.

In short, there was no basis in the record for the trial court's distinction between schools which were either 70% Negro or 70% Hispano on the one hand, and those whose combined Negro and Hispano enrollment exceeded 70%. Yet the trial court found one group to be denying equal protection and declined to find a violation as to the subject schools. 313 F. Supp. at 69, 77.

Neither is there any legal basis for the distinction. It is clear that the protection of the Fourteenth Amendment is not limited to Negroes[163] and extends to Hispanos.[163]

While the violation here was unequal provision of opportunity rather than intentional segregation, it would make little rational sense to declare that a formerly separate tri-racial system of Anglos, Negroes and Hispanos could be "desegregated" by simply integrating the Negroes and Hispanos and leaving the Anglos in racially identifiable, all-white schools.[164]

The distinction leads to other irrational results. The effect of the distinction is that it is unconstitutional

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[159] Coleman, A. 1534a; O'Reilly, A. 1952a-54a. PX 83.

[161] Dodson, A. 1473a-76a, A. 1498a-99a; O'Reilly, A. 1952a-53a.

[163] *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Korematsu* v. *United States*, 323 U.S. 214 (1944).

[163] *Hernandez* v. *Texas*, 349 U.S. 475 (1954); *Cisneros* v. *Corpus Christi Indep. School District*, 324 F. Supp. 599, 606 (S.D. Tex. 1970), appeal pending.

[164] In *Cisneros*, *supra*, n. 163, the federal district court determined that such "desegregation" did *not* meet the disestablishment requirements of *Brown*, and ordered integration of Anglos as well. 324 F. Supp. at 616, 628.

to discriminate against Negroes *or* Hispanos, but not against them together. It simply does not make sense to invalidate actions taken against Negroes or Hispanos separately while declaring the same actions legal if taken against them together.

The constitutional violation affected these nine subject schools; the remedy was equally appropriate for them. The trial court erred in failing to extend the remedy to these schools.

III.

Considered Together the Proven Racial Segregation and the Proven Inequality of Educational Opportunity in Denver Require a System-Wide Remedial Approach.

Considered separately, the constitutional violations discussed in parts I and II of the Argument, *supra*, would each support the relief sought by petitioners. Considered together they reinforce the need for a systematic remedy and a thorough remedy. Considered together they show the full magnitude of the constitutional deprivation imposed by the current system. The depth of the wrong inflicted on the victims of discrimination is more clearly seen when the practice of covert racial segregation is seen in connection with the operation of a caste-type separate and unequal educational system in the segregated schools. There can be no doubt that such a combination of wrongs inflicts serious injury and justifies extraordinary remedies.

CONCLUSION

Wherefore, petitioners respectfully submit that the judgment of the court of appeals should be reversed insofar as it reverses the judgment of the district court, and that the case should be remanded to the district court with directions that the court grant the prayers of the complaint requesting implementation of a comprehensive desegregation plan for the Denver school system.

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